Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

The Washington Water Power Company,

Petitioner,

v.

Spokane Indian Tribe,

Respondent.

PETITION FOR WRIT OF CERTIORI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(Docket No. 91-35000)

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QUESTION PRESENTED

1. Does the final decision in *Washington Water Power Co. v. Federal Energy Regulatory Commission (Respondent) and Spokane Tribe of Indians (Intervenor)*, 775 F.2d 305 (D.C. Cir. (1985) and the federal common-law doctrines of collateral estoppel and res judicata bar or preclude relitigation of the facts and law in the United States District Court relating to the rights, title and interests of The Washington Water Power Company (WWP) under the Act of March 3, 1905 (33 Stat. 1006) to construct, operate, and maintain WWP's Little Falls Power Development located on the Spokane River?

2. Should the unpublished Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit in *Spokane Indian Tribe v. State of Washington, Washington Water Power Company and United States of America* (Docket No. 91-35000), filed on March 12, 1992, be reversed and remanded with instructions to affirm and reinstate the orders of the United States District Court which dismissed the claims of the Spokane Tribe of Indians against WWP?

PARTIES BEFORE THE NINTH CIRCUIT COURT OF APPEALS AND DISTRICT COURT

Petitioner:

The Washington Water Power Company (WWP)* is a corporation organized under the laws of the State of Washington which provides electric and natural gas utility service in the States of California, Idaho, Montana, Oregon and Washington. WWP was an appellee before the United States Court of Appeals for the Ninth Circuit and was a defendant before the United States District Court for the Eastern District of Washington. WWP was the Petitioner in *Washington Water Power Company v. Federal Energy Regulatory Commission (Respondent) and Spokane Tribe of Indians (Intervenor)*, 775 F.2d 305 (D.C. Cir. 1985) (*WWP v. FERC*).

Respondent:

The Respondent is the Spokane Tribe of Indians, which was the appellant before the United States Court of Appeals for the Ninth Circuit and was the plaintiff before the United States District Court for the Eastern District of Washington. The Spokane Tribe of Indians was a fully participating party-intervenor in *WWP v. FERC*.

* WWP has wholly owned subsidiaries, one of which subsidiaries has wholly owned subsidiaries.

Other Parties Below:

The State of Washington was a defendant before the United States District Court for the Eastern District of Washington. The United States of America became a defendant before the United States District Court for the Eastern District of Washington after the district court dismissed the claims against WWP.

Neither the State of Washington nor the United States of America participated in the proceedings before the United States Court of Appeals nor has the State or United States claimed any interest adverse to WWP in the proceedings below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES BEFORE THE NINTH CIRCUIT COURT OF APPEALS AND DISTRICT COURT ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS RENDERED BY OTHER COURTS IN THIS PROCEEDING x

GROUNDS AND JURISDICTION FOR PETITION 1

Opinions To Be Reviewed And Order Extending Time For Petition For Writ of Certiorari 1

Jurisdiction And Grounds For Review By Writ Of Certiorari 2

STATUTES INVOLVED IN THE CASE 4

OPINIONS BELOW 4

STATEMENT OF THE CASE 5

Introduction 5

History of FPC, FERC And D.C. Circuit Court Proceedings . 10

History of the United States District Court for the Eastern District of Washington and Ninth Circuit Court of Appeals Proceedings. 19

REASONS FOR ISSUING WRIT OF CERTIORARI 26

Summary Discussion of Reasons For Issuing Writ of Certiorari 26

The Ninth Circuit Court Of Appeals Should Be Reversed And Remanded With Instructions To Reinstate The Orders Of The District Court Which Dismissed The Claims Of The Spokane Tribe Of Indians Against WWP Based On Collateral Estoppel 30

The Doctrine Of Collateral Estoppel Should Be Applied 33

The Same Issues Were Before The D.C. Circuit Court Of Appeals In *WWP v. FERC* . . 36

Error Was Committed By Ninth Circuit Court Of Appeals . 39

The Ninth Circuit Court Opinion Requires WWP To Relitigate Its Title And Creates A Potential For Conflict Between Court Decisions Between The Same Parties . 43

The Ninth Circuit Court's Memorandum Opinion Wastes Judicial Resources 50

The Ninth Circuit Opinion Is Inconsistent With The D.C. Circuit Opinion 59

CONCLUSION 61

TABLE OF AUTHORITIES

Page(s)

Cases

Supreme Court

Allen v. McCurry, 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 441 (1980) 31

Blonder-Tongue Labs v. University Foundation, 402 U.S. 313, 28 L.Ed.2d 288, 91 S.Ct. 1434 (1971) 31

Hopkins v. Lee, 19 U.S. (6 Wheat.) 109, 5 Law.Ed. 218 (1821) . . . 30

Montana v. United States, 440 U.S. 147, 59 L.Ed.2d 210, 99 S.Ct. 970 (1979) . 31-33,57, 58,64

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 3 L.Ed.2d 1345, 78 S.Ct. 1209 (1958) 31, 33-35, 48, 63, 64

United States v. Utah Construction and Mining Co.,384 U.S. 394, 16 L.Ed.2d 642, 86 S.Ct. 1545 (1966) 31

University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct 3220 (1986) 31

Other Federal

Montana Power Company v. Federal Power Commission, 185 F.2d 491 (D.C. Cir. 1950) 60,61

State of Washington Department of Game v. Federal Power Commission, 207 F.2d 391 (9th Cir. 1953) 34

United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D. Wash. 1941) 43,44,54, 55,62

Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985) . . . . . *[passim]*

Statutes

Federal

Federal Power Act
Section 23(a) [16 USC § 816] . 4,16,36
Section 23(b) [16 USC § 817]. 4,16,36, 46, 60
Section 306 [16 USC § 825e] 46
Section 307(a) [16 U.S.C. § 825f(a)] 46
Section 313(b) [16 U.S.C. § 825 l] 18,34
28 USCA § 1254(1) (Supp. 1992) 2

Act of March 2, 1899, Section 3 (30 Stat. 990) 4
Act of March 3, 1905 (33 Stat. 1006) . . . i, 4, 12, 13, 41, 43, 54
28 U.S.C. § 1331 3
28 U.S.C. § 1362 3

State

RCW 80.12.020 (1991) 52

Other Authorities

Article III of the United States Constitution 3

Supreme Court Rule 10.1(a) 3

The Washington Water Power Company, Project No. 2545, FERC Opinion No. 117, 15 FERC ¶ 61,039, pp. 61,064 *et seq.* (1981) . . . 5,10,15

The Washington Water Power Company, Project No. 2545-007, FERC Opinion No. 117-A, 25 FERC ¶ 61,002, pp. 61,001 *et seq.* (1983) 5,10,17

Washington Water Power Company, Project No. 2545, 11 FERC ¶ 63,001, pp. 65,001 *et seq.* (1980) 5,11,14

OPINIONS RENDERED BY OTHER COURTS IN THIS PROCEEDING

The unpublished Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit filed on March 12, 1992, is set forth in the Appendix at page 4a, *et seq.* The Order Denying The Washington Water Power Company's Petition for Rehearing was entered on May 28, 1992, and is set forth at Appendix 2a. The opinion of the United States District Court for the Eastern District of Washington entitled, "Order Re: WWP and Litigation Schedule" entered on February 8, 1990 is set forth at Appendix 16a. The District Court's Order Denying Motion for Reconsideration is set for at Appendix 26a.

NO. _____

IN THE
UNITED STATES SUPREME COURT

The Washington Water Power Company,
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PETITION FOR WRIT OF CERTIORARI

GROUNDS AND JURISDICTION FOR PETITION

Opinions To Be Reviewed And Order Extending Time For Petition For Writ of Certiorari.

The Washington Water Power Company (WWP) petitions this Supreme Court of the United States for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review the unpublished

Memorandum Opinion in *Spokane Tribe of Indians v. State of Washington, Washington Water Power Co., and the United States of America*, dated March 12, 1992. (Appendix p. 4a). On May 28, 1992, the Ninth Circuit Court of Appeals denied WWP's Petition for Rehearing. (Appendix p. 2a). On August 14, 1992, Supreme Court Justice O'Connor granted an extension of time to WWP (to September 25, 1992) within which to file a petition for a writ of certiorari. (Appendix p. 1a).

Jurisdiction And Grounds For Review By Writ Of Certiorari.

This Supreme Court of the United State has jurisdiction to issue a Writ of Certiorari pursuant to 28 USCA § 1254(1) (Supp. 1992) to review the Memorandum Opinion of the Ninth Circuit Court of Appeals issued in *Spokane Indian Tribe v. State of Washington; Washington Water Power Company; and United States of*

America, in Docket No. 91-35000 filed on March 12, 1992.[1] This court has the judicial power to review the application of federal common-law of The Ninth Circuit Court of Appeals under Article III of the United States Constitution.

WWP asserts that under Supreme Court Rule 10.1(a) this Court should assert its power and authority to issue a Writ of Certiorari for the following reasons:

(a) The Memorandum Opinion of the Ninth Circuit Court of Appeals is in conflict with the decision of the D.C. Circuit Court of Appeals in *Washington Water Power v. Federal Energy Regulatory Commission and Spokane Tribe of Indians*, 775 F.2d 305 (D.C. Cir. 1985); and

(b) The Ninth Circuit Court of Appeals has so far departed from the accepted and usual course of federal

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[1] Federal jurisdiction in the first instance was based on 28 U.S.C. §§ 1331 and 1362.

judicial proceedings by requiring WWP to relitigate facts and law which were previously litigated between these same parties in prior proceedings in another federal court.

STATUTES INVOLVED IN THE CASE

The particular statutes of significance involved in this case include:

1. Act of March 3, 1905 (33 Stat. 1006), Appendix at p. iiia;
2. Section 23 of the Federal Power Act (16 USCA § 816 and 16 USCA § 817) Appendix at p. xia and xiia.

OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Ninth Circuit has not been reported, but it is reprinted in the Appendix, p. 4a. The Order Re: WWP and Litigation Schedule entered in the United States District Court for the Eastern

District of Washington (Alan A. McDonald) has not been reported. It is reprinted in the Appendix, p. 16a. The Order Denying Motion for Reconsideration entered in the United States District Court is set forth at Appendix, p. 26a.

STATEMENT OF THE CASE

Introduction.

This is the seventh occasion in the last 21 years when WWP has been required to appear before an adjudicatory forum to defend its property rights against claims by the Spokane Tribe of Indians in connection with the Little Falls Power Development.[2]

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[2] *See Washington Water Power Company, Project No. 2545,* 11 FERC ¶ 63,001, pp. 65,001 *et seq.* (1980) [Appendix, p. 345a]; *The Washington Water Power Company, Project No. 2545,* FERC Opinion No. 117, 15 FERC ¶ 61,039, pp. 61,064 *et seq.* (1981) [Appendix, p. 417a]; *The Washington Water Power Company, Project No. 2545-007,* FERC Opinion No. 117-A, 25 FERC ¶ 61,002, pp. 61,001 *et seq.* (1983) [Appendix, p. 480a]; *Washington Water Power Company v. Federal Energy Regulatory Commission,*

(continued...)

After 14 years before the Federal Power Commission (FPC)[3], the Federal Energy Regulatory Commission (FERC) and the United States Court of Appeals, District of Columbia Circuit, a final decision was entered in *Washington Water Power Company v. Federal Energy Regulatory Commission*, 775 F.2d 305 (D.C. Cir. 1985) (hereinafter *WWP v. FERC*). In that case, the Court held that The Washington Water Power Company (WWP) "now owns the rights,

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[2](...continued)
775 F.2d 305 (D.C. Cir. 1985) [Appendix, p. 594a]; the orders of the United States District Court for the Eastern District of Washington dismissing the Tribe's complaint against WWP as being barred by collateral estoppel based upon *WWP v. FERC*, (1992) [Appendix p. 16a and p. 26a]; and the Memorandum Opinion of the Ninth Circuit Court of Appeals in *Spokane Indian Tribe v. State of Washington, et al*, by which the Ninth Circuit Court reversed the judgment of the United States District Court (1992) [Appendix p. 4a]. WWP petitions to have the vexatious litigation terminated against it on the basis that further litigation is barred by the doctrine of collateral estoppel and related doctrines of preclusion.

[3] In 1971, The Spokane Tribe of Indians filed a petition to intervene before the FPC, alleging ownership of rights and a claim of damages. A copy of the Tribe's Petition to Intervene is set forth at Appendix, p.309a.

title, interest, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development... ." *Id.* at 336. At all times relevant thereto, the Spokane Tribe of Indians was a full fledged party and intervenor and litigant before the FPC, FERC, and the D.C. Circuit Court. Those proceedings were commenced, advocated, supported, and provoked by the Tribe.[4]

During the FERC proceedings, the Tribe commenced a separate action before the United States District Court for the Eastern District of Washington in 1982, making the same claims and seeking the same relief that was sought before the FPC and FERC.[5] WWP moved for summary judgment

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[4] *See* The Tribe's petition filed with the FPC in 1971 (Appendix p. 309a).

[5] *See* The Tribe's Complaint in the United States District Court for the Eastern District of Washington, Appendix 68a.

of dismissal of the complaint in 1989 based upon the decision of the D.C. Circuit Court in WWP v. FERC.[6] The District Court dismissed all claims of the Tribe based upon the doctrines of collateral estoppel and issue preclusion.[7]

In an unpublished Memorandum Opinion, the Ninth Circuit Court of Appeals reversed the district court and remanded, concluding that the decision of the D.C. Circuit Court of Appeals did not bar the Tribe from claiming title to WWP's Little Falls Power Development property.[8]

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[6] *See* WWP's Supplemental and Second Amended Answer (Appendix 94a), WWP's Motion for Summary Judgment (Appendix 16a), WWP's Statements of Fact (Appendix 26a and 304a), WWP's Memorandum of Authorities (Appendix 282a), and the Affidavits of Jerry K. Boyd (Appendix 119a, 125a, 137a and 140a. In order to reduce the volume of the Appendix, WWP has not included all of the affidavit exhibits in the Appendix; however, some of the exhibits are included in the Appendix as separate documents.

[7] *See* the district court opinion at Appendix pp. 16a and 26a.

[8] *See* Memorandum Opinion, Appendix at p. 4a.

The decision of the Ninth Circuit Court of Appeals exposes WWP to the possibility that a decision may be rendered in the United States District Court and the Ninth Circuit Court of Appeals (on appeal) that will be inconsistent with and in conflict with the decision of the D.C. Circuit Court of Appeals in *WWP v. FERC*. Only the application of the doctrine of collateral estoppel or issue preclusion will bar or avoid requiring WWP to twice litigate its property rights in two different forums with the possibility of two different results.

To show the injustice and inequity of such a result, the factual and procedural background of the two litigation tracks are set forth below. Those litigation tracks are:

(1) The litigation before the FPC, FERC, and finally the United States Court

of Appeals for the District of Columbia Circuit; and

(2) The United States District Court for the Eastern District of Washington and the Ninth Circuit Court of Appeals.

History of FPC, FERC And D.C. Circuit Court Proceedings.

The history of the prior litigation and the decisions rendered in the prior litigation are described and set forth in *Washington Water Power Co. v. Federal Energy Regulatory Commission and Spokane Tribe of Indians*, intervenor, 775 F.2d 305 (D.C. Cir. 1985) (Appendix at p. 594a); The Washington Water Power Company, Project No. 2545-007, FERC Opinion No. 117-A, 25 FERC ¶ 61,002, pp. 61,001-61,030 (1983) (Appendix at p. 480a); The Washington Water Power Company, Project No. 2545, FERC Opinion No. 117, 15 FERC ¶ 61,039, pp. 61,064-61,080 (1981) (Appendix at p. 417a); and Washington

Water Power Company, Project No. 2545, 11 FERC ¶ 63,001, pp. 65,001-65,013 (1980) (Appendix at p. 345). A history of the prior litigation is also discussed in the Affidavits of Jerry K. Boyd set forth at Appendix, pp. 119a, 125a, 137a and 140a, which affidavits were filed with the United States District Court for the Eastern District of Washington.

In the FPC/FERC proceedings, the Tribe intervened and claimed that WWP did not acquire the property rights that were necessary for the construction, operation and maintenance of the Little Falls Power Development and therefore WWP should be required to obtain a license from the Federal Power Commission (later the Federal Energy Regulatory Commission) pursuant to the Federal Power Act.[9] The Tribe and the Secretary of the Interior

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[9] *See* Tribe's Petition to Intervene filed with the FERC in 1971, Appendix at p. 309a.

claimed: (1) the Tribe, or the United States on behalf of the Tribe, owns the land where WWP's Little Falls hydroelectric development is located; (2) the Little Falls hydroelectric development blocked and interfered with fishing rights of the Tribe and therefore the Tribe was damaged and was entitled to compensation; and (3) that WWP did not pay fair compensation for the land it acquired.[10]

In the FPC/FERC proceeding WWP made the following claims: (1) WWP acquired all of the rights, title and interest in land and water for the Little Falls Power Development pursuant to the Act of March 3, 1905, which rights were acquired prior to June 10, 1920 and therefore Little Falls is exempt from licensing under Section 23 of the Federal Power Act; (2) WWP fully compensated the United States

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[10] *Id.*

and the Tribe for its Little Falls rights pursuant to the 1905 Act; and (3) the Tribe has no claim for any damages with respect to any claimed fishing rights since WWP fully complied with the applicable law.[11] The Tribe and the staff of the FERC opposed WWP's claim of exemption and argued that WWP did not have all of the rights, title and interest necessary for the construction, operation and maintenance of Little Falls and that therefore WWP was required to obtain a license under the Federal Power Act.[12]

WWP moved for dismissal of FERC proceeding on the basis that FERC had no jurisdiction over WWP's Little Falls property rights. The Tribe, Interior, and

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[11] *See* the issue adjudicated in *WWP v. FERC, supra*. [Appendix at p. 594a].

[12] *See* the Affidavit of Jerry K. Boyd dated October 6, 1989 for a description of the Tribe's contentions before the FERC (Appendix at p. 125a) at 126a-127a, and the Tribe's Petition In Intervention before the FPC (Appendix at 309a).

FERC Staff opposed WWP's motion and supported FERC jurisdiction. FERC retained jurisdiction and determined whether or not WWP had acquired all of the rights necessary for the construction, operation and maintenance of Little Falls prior to June 10, 1920.[13]

Extensive hearings were held and more than 150 exhibits were admitted in an administrative proceeding before an FERC Administrative Law Judge (ALJ). After hearings and briefings and consideration of the evidence, the ALJ ruled that WWP did not have all of the rights necessary for the construction, operation and maintenance of the Little Falls Power Development. Washington Water Power Company, Project No. 2545, 11 FERC ¶ 63,000, p. 65,001, pp. 65,011-012 (1980). A review of the ALJ decision shows

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[13] *See* the FERC orders (Appendix 345a at 406a-407a; 417a at 465a; and 480a at 566a-567a).

that the parties had a full and fair adversarial proceeding in which the validity and nature of WWP's rights, title and interest were at issue with respect to Little Falls.

On review, the FERC affirmed, with modifications, the Initial Decision of the ALJ. FERC Opinion No. 117; Opinion and Order Affirming, With Modifications, the Initial Decision on Jurisdiction; The Washington Water Power Company, Project No. 2545, 15 FERC ¶ 61,039, pp. 61,064 *et seq.* (1981). (Appendix at p. 417a) As FERC Opinion No. 117 shows, the Spokane Indian Tribe, the Secretary of the Interior, and the Staff, FERC participated in the FERC proceedings. 15 FERC at p. 61,065 (Appendix at 417a). (For an example of the extent to which the Tribe participated, *see* 15 FERC at p. 61,069 [Appendix at 436a-438a].) A review of FERC Opinion No. 117 shows that the parties

fully litigated WWP's property rights and that the FERC fully considered the available evidence and record with respect to the nature, extent and effect of WWP's Little Falls property rights, title and interest. (*E.g.*, *see* Appendix 436a-441a)

It is shown that FERC's determinations of title were deemed necessary as part of the FERC's function in determining whether or not the Little Falls Power Development was exempt from licensing under Section 23[14] of the Federal Power Act.[15] Ultimately, the FERC determined WWP's property rights, title and interest with respect to Little Falls and further determined that such rights, title and interest were not sufficient to

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[14] Sections 23(a) [16 USC § 816] and 23(b) [16 USC § 817] of the Federal Power Act as they existed in 1985 are set forth in the Appendix at pp. xia and xiia.

[15] FERC actually determined WWP's title to land (Appendix at 420a and 439a)

exempt WWP from licensing Little Falls under Section 23 of the Federal Power Act. 15 FERC at pp. 61,073-61,076.

WWP sought rehearing of FERC Opinion No. 117. After further consideration of the record, the FERC issued FERC Opinion No. 117-A, The Washington Water Power Company, Project No. 2545-007, 25 FERC ¶ 61,002, pp. 61,001 *et seq.* (1983). Again, the FERC reviewed the record before it, considered the arguments of counsel for all of the parties, including the Tribe, and made various determinations with respect to WWP's property rights, title and interests and the legal foundation of those rights, title and interests. The extent to which the FERC examined and considered WWP's property interests in order to find some defect in title which would be sufficient for FERC to exercise jurisdiction is discussed in the dissenting opinion of FERC Chairman

Butler, 25 FERC at p. 61,027. (Appendix at p. 582a)

Finally, on judicial review of the FERC decisions pursuant to 16 USCA § 8251, WWP prevailed before the United States Court of Appeals for the District of Columbia Circuit. *WWP v. FERC*. In that case, the D.C. Circuit Court reviewed the transcript of the hearings and all 159 exhibits relating to WWP's title to the Little Falls property. After reviewing the extensive record established before the FERC relating to WWP's rights, title and interest, the D.C. Circuit Court concluded that WWP "now owns the rights, title, interests, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development... ." *WWP v. FERC*, *supra* at 336. (Appendix at p. 729a) This decision and conclusion was reached as a matter of law based upon the entire record before

the FERC. A review of the decision in *WWP v. FERC,* including the dissent, shows that if WWP did not own all of the rights, title, interests, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development, WWP would have been required to license the Little Falls Power Development under the Federal Power Act.

History of the United States District Court for the Eastern District of Washington and Ninth Circuit Court of Appeals Proceedings.

In 1982, the Spokane Tribe of Indians filed a complaint in the United States District for the Eastern District of Washington seeking damages and title to the land occupied by WWP's Little Falls Power Development.[16] The Tribe claimed

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[16] Appendix at p. 68a.

that WWP did not have all of the rights, title, interest and property necessary for the construction, operation and maintenance of the Little Falls power project and that therefore WWP owed the Tribe money damages. After *WWP v. FERC* was decided by the D.C. Circuit Court, WWP moved for dismissal of the Tribe's complaints based upon the doctrine of collateral estoppel and issue preclusion.[17] In support of such motion, WWP presented nearly the entire FERC record to the District Court, including the Tribe's Petition to Intervene before the FPC and copies of many of the exhibits that were before the FERC through the affidavits of Jerry K. Boyd, WWP's attorney, before the FERC and the D.C. Circuit Court.[18] All of the Exhibits

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[17] Appendix at p. 116a.

[18] Appendix at p. 119a, 125a, 137a and 140a.

attached to the affidavits are not included in the Appendix to this Petition due to the volume and nature of the exhibits. However, the affidavits and the exhibits were before the Ninth Circuit Court of Appeals in the form of Supplemental Excerpts of Record.[19]

The uncontested facts before the United States District Court included: (1) the Tribe had commenced and prosecuted the action before the FPC and FERC; (2) the Tribe was a full-fledged party and had a full and fair opportunity to litigate all of the relevant facts relating to WWP's rights, title and interest for the Little Falls Power Development before the FPC, FERC, and the D.C. Circuit Court; (3) the Tribe's

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[19] The indices to the Supplemental Excerpts of Record in the Ninth Circuit Court of Appeals are included in the Appendix to this Petition at p. 260a and p. 264a. The entire Supplemental Excerpt of Records before the Ninth Circuit Court has not been reproduced in the Appendix to this Petition due to the volume of the documents.

attorneys before the FPC, FERC, and D.C. Circuit Court were the same attorneys that appeared on behalf of the Tribe before the United States District Court; (4) the allegations made with respect to WWP's property rights and for damages were the same before the FPC, FERC and D.C. Circuit Court as the claims that were made before the U.S. District Court; and (5) WWP had incurred substantial costs in litigating its rights, title and interest for the Little Falls Power Development before the FPC, FERC and D.C. Circuit Court and that it would be unfair and unjust to require WWP to relitigate its rights, title and interest.

After reviewing the entire record before it, the United States District Court for the Eastern District of Washington (the Hon. Alan A. McDonald) concluded that the facts and issues that were before the FPC, FERC and D.C. Circuit

Court were the same facts and issues that were before the United States District Court and that such issues had been fully litigated in the FPC, FERC and D.C. Circuit Court of Appeals as shown in *WWP v. FERC*. Therefore, the United States District Court concluded that the Tribe's claims before the District Court were barred by the application of the doctrines of collateral estoppel and issue preclusion and that the Tribe's complaint against WWP would be dismissed.[20]

On appeal, the Ninth Circuit Court of Appeal issued an unpublished Memorandum Opinion concluding that the United States Court of Appeals for the D.C. Circuit "did not address the Tribe's claimed ownership interests in the disputed property." (Memorandum Opinion at p. 4, Appendix at

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[20] The District Court's Order Re: WWP and Litigation Schedule and Order Denying Motion for Reconsideration are set forth in Appendix at p. 16a and 26a.

p. 9a). The Ninth Circuit Court further stated that "the ownership issue could be resolved in the Tribe's favor without creating an inconsistency with *Washington Power*, the Tribe is not collaterally estopped from asserting its ownership claim." (Memorandum Opinion at p. 5, Appendix at p. 11a). In its Memorandum Opinion, the Ninth Circuit failed to consider that the Tribe had challenged WWP's property rights, title and interest and that the D.C. Circuit Court had, of necessity, determined WWP's rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Power Development. The Ninth Circuit Court failed to recognize that since WWP's construction, operation and maintenance of the Little Falls Power Development was determined by the D.C. Circuit Court to be lawful under acts of Congress and that all of the compensation

required by Congress had been paid. Finally, the Memorandum Opinion of the Ninth Circuit does not expressly recognize that the opinion of the D.C. Circuit Court of Appeals in *WWP v. FERC* has any binding effect whatever upon the Spokane Indian Tribe.

The final insult in the opinion of the Ninth Circuit Court of Appeals was made in the Ninth Circuit's Memorandum Opinion when it stated "the only issue ever litigated during those [*WWP v. FERC*] proceedings was whether WWPC had an interest, any interest, that would trigger the licensing exception in the Federal Power Act." (Memorandum Opinion at p. 6, Appendix at p. 13a). Apparently, the Ninth Circuit Court concluded that all WWP had to show in the FPC, FERC and D.C. Circuit Court proceedings is that WWP had some colorable claim to title to a "right-of-way." This, of course, is refuted by the

careful analysis that was made in *WWP v. FERC* by the D.C. Circuit Court of Appeals, which will be discussed below.

REASONS FOR ISSUING WRIT OF CERTIORARI

Summary Discussion of Reasons For Issuing Writ of Certiorari.

The Memorandum Opinion of the Ninth Circuit Court of Appeals exposes WWP to multiple and vexatious litigation over WWP's rights, title and interests necessary for the construction, operation and maintenance of the Little Falls Power Development. The Ninth Circuit Court's Memorandum Opinion allows a possible conflict between the decision of the United States District Court for the Eastern District of Washington and the final decision of the United States Court of Appeals for the District of Columbia Circuit.

WWP was put through extensive and costly litigation of WWP's rights, title and interest to its Little Falls Power Development property before the FPC, the FERC and the District of Columbia Circuit Court of Appeals, that litigation was requested by the Spokane Tribe of Indians and in which litigation the Tribe participated as a full-fledged party with full and complete rights to offer testimony and exhibits and a full and complete right to brief and argue. The outcome of that litigation is a final binding decision of the United States Court of Appeals for the District of Columbia Circuit, *WWP v. FERC,* 775 F.2d 305 (D.C. Cir. 1985), which decision was issued approximately 14 years after the Tribe commenced its action before the FPC contesting WWP's property rights. That final binding decision included the following determinations:

(1) WWP currently holds "a limited fee with implied reverter for non-use" to the Little Falls power project property. *Id.* at 325. (Appendix at 679a)

(2) "The Washington Water Power Company by appropriation acquired the water rights and the lawful right-of-way for the construction of a dam to divert, store and beneficially use the subject waters of the Spokane River and now owns the rights, title, interest, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development... ." *Id.* at 336.

Based upon the FPC and FERC record, (much of which was also presented to the District Court Judge below, and based upon the decision in *WWP v. FERC*, the District Court below concluded that WWP is entitled to dismissal of all of the Tribe's claims for damages based on a claim that WWP had

unlawfully constructed, operated and maintained the Little Falls Power Development. The Ninth Circuit Court of Appeals reversed that decision and remanded the matter for further proceedings, thus requiring WWP to relitigate its property rights, title and interest with respect to the Little Falls Power Development. WWP is gravely concerned that such relitigation could result in a conclusion that WWP does not have "a limited fee with implied reverter or non-use" to the Little Falls Power Development property or that WWP does not now own "the rights, title, interest, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development." Such a result would be in direct conflict with the decision of the D.C. Circuit Court of Appeals. Therefore,

the Writ of Certiorari should be granted to avoid such a conflict.

The Ninth Circuit Court Of Appeals Should Be Reversed And Remanded With Instructions To Reinstate The Orders Of The District Court Which Dismissed The Claims Of The Spokane Tribe Of Indians Against WWP Based On Collateral Estoppel.

Since 1821, this Court has generally held that when a matter has been contested between the same parties in any other court, the decision of that court "puts an end to all further controversy concerning the points thus decided between the parties in such suit." *Hopkins v. Lee*, 19 U.S. (6 Wheat.) 109, 113, 5 Law.Ed. 218, 219 (1821). In 1979, this Court concluded that:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent

> jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ... .' *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49, 42 L.Ed. 355, 18 S.Ct. 18 (1897)."

Montana v. United States, 440 U.S. 147, 153, 59 L.Ed.2d 210, 216, 99 S.Ct. 970 (1979). *See, also University of Tennessee v. Elliott,* 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct 3220 (1986); *Allen v. McCurry,* 449 U.S. 90, 66 L.Ed.2d 308, 101 S.Ct. 441 (1980); *Blonder-Tongue Labs v. University Foundation,* 401 U.S. 532, 28 L.Ed.2d 288, 91 S.Ct. 1017 (1971); *United States v. Utah Construction and Mining Co.,* 384 U.S. 394, 421, 16 L.Ed.2d 642, 86 S.Ct. 1545 (1966); and *Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 2 L.Ed.2d 1345, 78 S.Ct. 1209 (1958). The determinations of issues and rights which are actually and necessarily determined by a court of competent jurisdiction is conclusive in subsequent suits based on a different

cause of action involving a party to the prior litigation. *Id.* In *Montana*, the court went on to state the application of the doctrine of collateral estoppel procedures:

> parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries [here WWP] from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Supra at 153-154.

WWP files this Petition for Writ of Certiorari in order to avoid "the expense and vexation attending multiple lawsuits" and to avoid "the possibility of inconsistent decisions", which is at the heart of the doctrines of res judicata and collateral estoppel.

The Doctrine Of Collateral Estoppel Should Be Applied.

Certainly the doctrine of collateral estoppel should be applied where an issue is actually and necessarily determined by a court of competent jurisdiction. *Montana v. United States, supra* at 153. Also, the preclusive effect of decisions made by the Federal Power Commission and the Ninth Circuit Court of Appeals reviewing a decision of the Federal Power Commission was discussed by this Court in *Tacoma v. Taxpayers of Tacoma, supra*. There, when the State of Washington attempted to circumvent the effect of an FPC and Ninth Circuit Court decision by filing a separate action in a state court. In *Tacoma*, this Court concluded that the FPC (now the FERC) had the authority to decide all issues inhering in the controversy, and that the sole and exclusive remedy of the parties is to seek judicial review

pursuant to Federal Power Act, Section 313(b) [16 U.S.C. § 8251]. The *Tacoma* court concluded that the decision of the FPC and the United States Court of Appeals on judicial review is final and binding on all issues inhering in the controversy between the parties. *Id.* at 336.

It is noteworthy that in *Tacoma*, this Supreme Court reviewed the decision in *State of Washington Department of Game v. Federal Power Commission,* 207 F.2d 391 (9th Cir. 1953), and concluded that the statements made in the Ninth Circuit Court's decision showed that the very issue that was presented in *Tacoma v. Taxpayers of Tacoma* had been litigated in the Court of Appeals and had been decided by its judgment. *Id.* at 339. This Court went on to state in *Tacoma*:

> But even if it might be thought that this issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been, for that

> was the court to which Congress had given "exclusive jurisdiction to affirm, modify, or set aside" the Commission's order. And the State may not preserve the point, for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court... ."

Id.

In this case before this Court, the issue is substantially the same as the issue that was before this Court in *Tacoma*. The only difference is that instead of the legal issues and the facts being decided correctly by the FPC, in this case, the issues were decided by the United States Court of Appeals for the District of Columbia Circuit as a matter of law. A review of *WWP v. FERC* shows that WWP's property rights were determined.

The Same Issues Were Before The D.C. Circuit Court Of Appeals In *WWP v. FERC*.

The issues that were litigated before the FPC, FERC and the D.C. Circuit Court are apparent from the Tribe's Petition to Intervene before the FPC (Appendix at p. 309a) and the Opinions of the FERC and the D.C. Circuit Court of Appeals. (Appendix at pp. 342a, 345a and 417a. At all phases of the FPC, FERC and D.C. Circuit Court litigation, the Tribe claimed that WWP was required to obtain a license from the FERC under the Federal Power Act because WWP did not own all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Power Development. WWP's only defense to such claim is that the Little Falls Power Development was exempt from licensing under Section 23 of the Federal Power Act [16 U.S.C. § 816 and 16 U.S.C. § 817] on the basis that WWP had acquired

all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Power Development, prior to June 10, 1920.

By presenting irrefutable documentary evidence, WWP was able to establish, as a matter of law, that WWP currently holds "a limited fee with implied reverter for non-use"[21] and that WWP "now owns the rights, title, interest, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development."[22] The D.C. Circuit Court reached this conclusion after extensively reviewing all of the documentary evidence presented by all of the parties, including the Tribe, relating to the Tribe's claim of ownership of the subject property and WWP's ownership of

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[21] *WWP v. FERC*, 775 F.2d at 325 (Appendix at p. 679a).

[22] *Id.* at 336, Appendix at p. 729a.

the subject property. There can be no doubt that it was necessary for the Court of Appeals to consider and determine the Tribe's and WWP's ownership interests in the Little Falls Power Development property and WWP's rights to construct, operate and maintain the Little Falls Power Development in order to determine whether or not the Little Falls Power Development was exempt from licensing under the Federal Power Act. All of the factual and legal issues relating to WWP's rights with respect to the Little Falls Power Development were squarely presented to the FPC, FERC and D.C. Circuit Court of Appeals and were decided, with certainty and finality, by the D.C. Circuit Court of Appeals in *WWP v. FERC*.

All of the circumstances giving rise to the D.C. Circuit Court of Appeals' Opinion in *WWP v. FERC* were squarely presented to the United States District

Court for the Eastern District of Washington and to the United States Court of Appeals for the Ninth Circuit.[23] The District Court for the Eastern District of Washington carefully reviewed *WWP v. FERC* and the record that was before the D.C. Circuit Court of Appeals and unequivocally concluded that the Tribe was and should be precluded from requiring WWP to relitigate its rights, title and interests as they relate to the Little Falls Power Development. (Appendix at 16a and 26a.)

Error Was Committed By Ninth Circuit Court Of Appeals.

The Ninth Circuit Court of Appeals construed the law being applied by the D.C. Circuit Court of Appeals in *WWP v. FERC* very narrowly and then construed the opinion in *WWP v. FERC* even more narrowly.

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[23] *See* the Affidavits of Jerry K. Boyd, Appendix at pp. 114a, 125a, 137a and 140a.

Ninth Circuit Memorandum Opinion (Appendix at pp. 9a-11a). The Ninth Circuit Court stated that *WWP v. FERC* "merely determined that WWPC was not subject to the licensing requirements of the Federal Power Act, and did not decide whether the Tribe held an ownership interest in the disputed property." (Memorandum Decision, Appendix at p. 9a). The Ninth Circuit Court ignored the underlying determinations that were made in *WWP v. FERC* that were necessary before the D.C. Circuit Court could conclude that the Little Falls Power Development was not subject to the licensing requirements of the Federal Power Act. The Ninth Circuit Court ignored the exhaustive litigation required of WWP to preserve its property rights from a licensing requirement and the fact that WWP was required to, and did prove, as a matter of law, that WWP owned all of the rights, title and interest necessary for

the construction, operation and maintenance of the Little Falls Power Development. The Ninth Circuit Court of Appeals ignored the fact that the D.C. Circuit Court had rejected the Tribe's claim to the Little Falls Power Development property and had firmly held that WWP owned such property and it is the ownership of such property rights by WWP that allowed WWP to be exempt from licensing the Little Falls Power Development. *WWP v. FERC, supra* at 336 (Appendix, p. 729a-730a). Such determination of WWP ownership of property by the D.C. Circuit Court and determination that WWP's construction, operation and maintenance of the Little Falls Power Development was authorized and lawful under the Act of March 3, 1905, necessarily precludes a later claim by the Tribe that such construction, operation

and maintenance of the Little Falls Power Development is unlawful.

The Ninth Circuit Court of Appeals' Memorandum Opinion ignores the other issues that were decided by the United States District Court for the Eastern District of Washington. Those other issues include the District Court's decision that the Tribe's claims for damages in connection with WWP construction, operation and maintenance of the Little Falls Power Development was precluded by the decision in *WWP v. FERC*. The Ninth Circuit Court seems to have focused only on WWP's "precise" title.[24] Again, the Ninth Circuit Court of Appeals ignored the express language contained in *WWP v. FERC* which states that WWP holds "a limited fee

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[24] The Ninth Circuit Court stated that *WWP v. FERC* "does not involve a judicial determination of WWPC's precise property interest in the land under the Little Falls Dam." (Emphasis added.) (Memorandum Opinion at p. 4, Appendix at p. 9a).

with implied reverter for non-use" citing *United States v. Big Bend Transit Co.*, 42 F.Supp. 459 (E.D. Wash. 1941). For a more complete discussion of the nature of WWP's property rights, *see WWP v. FERC* and *United States v. Big Bend Transit Co., supra*. The principal distinctions between WWP's Little Falls Power Development and the Big Bend Transit Co. project is that WWP actually constructed its project in reliance upon the rights that it acquired from the Secretary of the Interior pursuant to the Act of March 3, 1905.

The Ninth Circuit Court Opinion Requires WWP To Relitigate Its Title And Creates A Potential For Conflict Between Court Decisions Between The Same Parties.

The Ninth Circuit Court Memorandum Opinion reversed and remanded the decision of the United States District Court to require that the Spokane Tribe of Indians and WWP relitigate WWP's rights, title and

interest to the Little Falls Power Development. What will be the result of such litigation? In the United States District Court below, substantially all of the evidence that was presented to FERC and was before the D.C. Circuit Court in *WWP v. FERC* will once again be presented to the United States District Court.[25] The United States District Court will then be required to review the law that was extensively analyzed in *WWP v. FERC* and *Big Bend Transit Co.* and will be required to review the evidence that was also discussed in *WWP v. FERC*. Then the United States District Court will be required to make findings and reach a conclusion of law.

WWP presumes that the conclusion of law will be the same as that reached in

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[25] Affidavit of Jerry K. Boyd, Appendix p. 125a at 129a. *See generally* the Affidavits of Jerry K. Boyd, Appendix pp. 119a, 125a, 137a and 140a.

WWP v. FERC. However, as in any litigation, it is possible that the United States District Court may reach a different conclusion. If the United States District Court reaches the conclusion that WWP does not have all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Power Development, then it is apparent that according to the United States District Court, the decision of the D.C. Circuit Court in *WWP v. FERC* is in error. The absurdity of such result is that, in essence, the United States District Court will have been put in a position of reviewing, and possibly overruling, a decision of the United States Court of Appeals for the District of Columbia Circuit.

Again, assuming, *arguendo*, that the United States District Court reaches a different conclusion than the D.C. Circuit

Court in *WWP v. FERC*, will the Spokane Tribe of Indians, the Secretary of the Interior, or the Staff of the FERC then file a complaint with the FERC contending that WWP has unlawfully constructed, operated and maintained the Little Falls Power Development in violation of Section 23(b) of the Federal Power Act [16 U.S.C. § 817] and Section 306 of the Federal Power Act [16 U.S.C. § 825e] authorizes any person to file a complaint against any public utility, which would include WWP, and allege that WWP is violating the Federal Power Act in its continued operation and use of the Little Falls Power Development. The FERC may investigate any complaint to determine whether or not a person has violated the Federal Power Act. Section 307(a) of the Federal Power Act [16 U.S.C. § 825f(a)]. Indeed, this is exactly what was done when the Tribe filed its Petition to Intervene

in 1971 in a licensing procedure wherein the Tribe complained that WWP had unlawfully constructed, operated and maintained the Little Falls Power Development and requesting that WWP be required to license the Little Falls Power Development.

If a complaint were to be filed by the Tribe, the Secretary of the Interior, or the FERC Staff based upon a United States District Court decision ruling that WWP does not have the lawful rights to construct, operate and maintain the Little Falls Power Development, what will be the reaction of WWP and FERC? WWP would argue that the FERC is barred by the doctrine of res judicata from requiring WWP to license the Little Falls Power Development. On the other hand, since the FERC went to extraordinary lengths in an attempt to exercise jurisdiction over the Little Falls Power Development in the earlier

proceeding that terminated in *WWP v. FERC*, it is conceivable that FERC may once again attempt to exercise jurisdiction over the Little Falls Power Development. Under the teachings of *Tacoma v. Taxpayers of Tacoma, supra,* parties that are before the FERC are only entitled to have licensing issues determined in one proceeding. Once that proceeding is final, the issues decided in that proceeding or that could have been decided in that proceeding are foreclosed from further litigation. *Tacoma v. Taxpayers of Tacoma, supra* at 339.

Assuming, *arguendo,* on remand the United States District Court reaches a different conclusion than the D.C. Circuit Court in *WWP v. FERC,* obviously WWP would appeal such decision to the Ninth Circuit Court of Appeals. If it is further assumed that the United States Court of Appeals affirms the United States District Court, obviously there will be a conflict between

the decision of the Ninth Circuit Court of Appeals and the decision of the D.C. Circuit Court of Appeals in *WWP v. FERC*. Where does that leave WWP? WWP would then be required to petition this United States Supreme Court, once again, for a writ of certiorari, asking this Court to resolve the conflict between the two opinions of the circuit courts which arise out of the same facts between the same parties concerning the same property.

Such possible conflict can and should be avoided by this Court issuing a writ of certiorari now rather than later. If a writ of certiorari is issued at this time and if the decision of the Ninth Circuit Court of Appeals is reversed, WWP, the Tribe, and the United States District Court will have avoided the expense and waste of judicial resources which will be involved in a re-trial of the issues

involving WWP's Little Falls Power Development property.

The Ninth Circuit Court's Memorandum Opinion Wastes Judicial Resources.

The D.C. Circuit Court decided in *WWP v. FERC* that WWP has the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Power Development. In doing so, the D.C. Circuit Court exhaustively examined the foundation of WWP's Little Falls Power Development rights and determined the extent and validity of those rights. The Tribe now wishes to relitigate WWP's rights and to have certain rights declared to be held by the Tribe. Such relitigation and determination will be futile.

The D.C. Circuit Court analyzed the Act of March 3, 1905 which provided for the acquisition of water rights and land for hydroelectric projects, such as the

Little Falls Power Development. The D.C. Circuit Court had, before it, all of the documentary evidence which showed that WWP had acquired the water rights and land rights for the Little Falls Power Development pursuant to the 1905 Act. WWP had paid all of the compensation which was provided in the 1905 Act. The Ninth Circuit Court, on the other hand, decided that *WWP v. FERC* did not establish "WWPC's *precise property interest* in the land under the Little Falls Dam." (Memorandum Opinion at p. 4, Appendix at p. 20a). Obviously, WWP contends that the Ninth Circuit plainly erred in such conclusion and apparently overlooked the conclusion of the D.C. Circuit Court that WWP holds "a limited fee with implied reverter for non-use." *WWP v. FERC, supra* at 325, Appendix at p. 679a. Assuming, *arguendo,* that the Tribe can establish that it has some reversionary interest in the Little

Falls Power Development lands, the establishment of such an interest by the Tribe will have no value to the Tribe. The Little Falls Power Development occupies such lands. The Little Falls Power Development is a very important hydro-electric resource to WWP, which is a public utility that serves electric power to hundreds of thousands of customers in Eastern Washington and Northern Idaho. WWP is prohibited, by law, from disposing of any utility property that is necessary or useful in performing the duties of the utility.[26] It is inconceivable that WWP or the Washington Utilities and Transportation Commission would ever approve of the disposal, sale or conveyance of the

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[26] RCW 80.12.020 provides that "no public service company shall sell, lease, assign or otherwise dispose of the whole or any part of its franchises, properties or facilities whatsoever, which are necessary or useful in the performance of the duties to the public ... without having secured from the [Washington Utilities and Transportation] Commission an order authorizing it so to do... ." RCW 80.12.020 (1991).

Little Falls Power Development. Indeed, the Little Falls Power Development has been dedicated to providing electric power to the public since 1910 when it was constructed and has been in continuous operation since that date. Therefore, the possibility of a reverter to the Tribe of the Little Falls Power Development lands for non-use has no value and is inconsequential as far as the dispute between WWP and the Tribe is concerned. Consequently, the Tribe will not be entitled to money even if WWP's "precise *property interests* in the land under Little Falls Dam" is established as a limited fee with implied reverter for non-use as stated in *WWP v. FERC,* in a proceeding before the United States

District Court for the Eastern District of Washington.[27]

In *United States v. Big Bend Transit Co.*, the court determined that Big Bend Transit Co. was entitled to "power site damages" in the condemnation action. *Id.* at 475. Obviously, both the D.C. Circuit

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[27] The United States District Court for the Eastern District of Washington is the same United States District Court that decided *United States v. Big Bend Transit Co.*, 42 F.Supp. 459 (E.D. Wash. 1941), which extensively analyzed the Act of March 3, 1905 (33 Stat. 1006) and the rights acquired under that Act and concluded that the rights acquired under that Act constitute a "limited fee with implied reverter for non-use." *United States v. Big Bend Transit Co.*, 42 F.Supp. 459, 472 (1941). It should be noted that *Big Bend Transit Co.* involved a condemnation case concerning a different power project where rights had been acquired under the Act of March 3, 1905, and where the project had never been constructed. The United States had commenced a condemnation action to acquire the power site lands from Big Bend Transit Co., which lands were to be used for the reservoir for the Grand Coulee Dam Project. The *Big Bend Transit Co.* Court reviewed a record that was substantially similar to the record that was before the FERC and the D.C. Circuit Court of Appeals in *WWP v. FERC*. The only difference being that the *Big Bend Transit Co.* litigation involved a different project at a different location on the Spokane River. As the *Big Bend Transit Co.* court noted, the Secretary of the Interior determined that the rights acquired under the 1905 Act constituted a limited fee with a possibility of reverter. *Id.*

Court of Appeals in *WWP v. FERC* and the United States District Court for the Eastern District of Washington in *U.S. v. Big Bend Transit Co.* determined that the respective power companies acquired the rights to construct, operate and maintain hydroelectric projects under the Act of March 3, 1905. What is left for the Tribe to obtain through litigation? How can the Tribe be entitled to compensation from WWP for rights that the United States Congress authorized the Secretary of the Interior to grant to WWP? How can the United States District Court provide relief for the Tribe from the decision that was made in *WWP v. FERC* or the decision that was earlier made by the Secretary of the Interior when the Secretary of the Interior memorialized the grant of lands and rights to WWP by an instrument dated July 2, 1924? (Appendix at p. 330a). The 1924 instrument, together with the entire

history that proceeded it, was before the FERC, was before the D.C. Circuit Court of Appeals, and was before the United States District Court for the Eastern District of Washington in this case below.[28] It is undisputed that WWP duly acquired the lands for the Little Falls Power Development by a grant from the Secretary of the Interior as authorized by the Act of March 3, 1905. It is undisputed that the Secretary of the Interior determined that WWP and its predecessor in interest "complied with all the rules and regulations promulgated by the Secretary of the Interior under said Act of March 3, 1905, and with all the provisions of said Act... ." (1924 grant, at p. 2, Appendix at p. 331a). What will be gained from requiring WWP to prove, once again, its

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[28] *See* the Affidavit of Jerry K. Boyd (Appendix at p. 129a). The 1924 instrument is set forth at Appendix at p. 330a.

property rights—or from allowing the Tribe to, once again, attempt to disprove WWP's property rights? Requiring WWP to incur the expense and vexation of such multiple litigation is inconsistent with the basic tenets of jurisprudence in the United States, which is that a party should only be subjected to only one litigation on an issue and should only be required to prove its rights or the merits of its case once and should not be subjected to multiple litigation with the risk that at some point in time some tribunal may reject that party's claim. *Montana v. United States, supra* at 153-154.

Incidentally, there are several factors in *Montana v. United States* that are analogous to this case, although the facts in this case are more persuasive than in *Montana v. United States*. In this case, the Tribe not only requested the FPC and FERC to adjudicate WWP's property

rights to determine whether or not WWP would be required to license the Little Falls Power Development, but the Tribe also participated as a full-fledged party, exercising all of its litigation rights. In *Montana v. United States*, the United States was not a direct party. The United States did not appear, present evidence, or otherwise directly participate in the earlier proceeding. In *WWP v. FERC,* the Spokane Tribe of Indians offered evidence, filed briefs, made arguments, and did all things that any party to litigation could or should do. WWP was required to respond to all of the allegations, evidence, and arguments made by the Tribe before the FERC and the United States Court of Appeals for the District of Columbia Circuit.

The Ninth Circuit Opinion Is Inconsistent With The D.C. Circuit Opinion.

In its Memorandum Opinion at p. 6 (Appendix at p. 13a), the Ninth Circuit made the following statement with respect to *WWP v. FERC*:

> "The only issue ever litigated during those [FERC and D.C. Circuit Court of Appeals] proceedings was whether WWPC had an interest, any interest, that would trigger the licensing exception in the Federal Power Act."

Such conclusion is not supported by a review of *WWP v. FERC* or the FERC opinions. (Appendix pp. 119a, 125a, 137a and 140a) Indeed, the D.C. Circuit Court of Appeals and the FERC all exhaustively reviewed the evidence before the FERC to determine whether or not there was any property interest which WWP did not have which would have been necessary for the construction, operation and maintenance of the Little Falls Power Development. If

there was any property interest that WWP did not have which was necessary for the Little Falls Power Development, undoubtedly the D.C. Circuit Court of Appeals would not have reversed the FERC and would have required licensing. *See, Montana Power Company v. Federal Power Commission*, 185 F.2d 491 (D.C. Cir. 1950).

The Ninth Circuit Court, in its Memorandum Opinion, totally misconstrued the Federal Power Act, particularly Section 23(b) [16 U.S.C.A. § 817]. Rather than determining if WWP had "any" interest in the disputed property, the real issue before the D.C. Court of Appeals in *WWP v. FERC* was whether or not WWP had "all" of the rights, title and interest necessary to construct, operate and maintain the Little Falls Power Development. Any defect in such interest would have subjected the Little Falls Power Development to the licensing jurisdiction of the FPC/FERC.

See Montana Power Company v. FPC, supra. Indeed, as is demonstrated in the FERC opinions, the FERC attempted to identify some defect in WWP's rights, title and interest so that FERC could exercise jurisdiction. As the D.C. Circuit Court determined in *WWP v. FERC*, no such defect exists. Now, the Tribe is seeking another opportunity to attempt to convince another judicial forum that such a defect exists, and the Ninth Circuit Court of Appeals is about to give the Spokane Tribe of Indians another chance to see if it can prevail.

CONCLUSION

For 14 years, the Spokane Tribe of Indians had a full and fair opportunity to challenge WWP's rights, title and interest to the Little Falls Power Development before the Federal Power Commission, the Federal Energy Regulatory Commission, and

finally the United States Court of Appeals for the District of Columbia Circuit. The final judicial decision in that effort was in favor of WWP. In *WWP v. FERC*, the United States Court of Appeals determined the precise legal rights of WWP as being "a limited fee with implied reverter for non-use, *See Big Bend Transit Co.*, 42 F.Supp. 459 (E.D. Wash. 1941) ...". The *WWP v. FERC* Court concluded that WWP has the rights, title and interest necessary to construct, operate and maintain the Little Falls Power Development. *Id.* at 336.

The United States District Court for the Eastern District of Washington reviewed the record that was before the FERC and that was before the court in *WWP v. FERC* and reviewed the affidavits before it and concluded that the claims made by the Tribe had been previously litigated and were barred by the doctrine of

collateral estoppel or issue preclusion, since the Tribe was a party in *WWP v. FERC*. The United States District Court for the Eastern District of Washington then dismissed the Tribe's complaint against WWP. On appeal, the Ninth Circuit Court of Appeals construed *WWP v. FERC* very narrowly and misconstrued the law applied by the *WWP v. FERC* court, and reversed and remanded the matter for further trial to determine WWP's "precise legal title".

WWP has been required to defend its legal rights to the Little Falls Power Development property for more than 20 years against claims being made by the Tribe. The costs of such defense have been tremendous. WWP prevailed in 1985 in *WWP v. FERC*. The Tribe should not be permitted to relitigate the issues that were raised before the FERC and in the D.C. Circuit Court of Appeals and were decided. *Tacoma v. Taxpayers of Tacoma, supra* at 336-341.

The Tribe should not be permitted to collaterally attack the decision of the United States Court of Appeals in *WWP v. FERC*. *Id*. at 341. Congress provided the exclusive means by which to review the decisions of the FERC under the Federal Power Act, Section 313(b) of the Act [16 U.S.C. § 8251]. *Tacoma v. Taxpayers of Tacoma, supra*, at 339 and 341. It would be unjust and unfair to WWP to require WWP to relitigate its property rights, and would be inconsistent with the precept that after the parties have had a full and fair opportunity to litigate issues, the final decision in that litigation should be determinative and final. *Montana v. United States, supra* at 153-154.

Based on the foregoing reasons, The Washington Water Power Company respectfully requests that this Court issue a Writ of Certiorari to the Ninth Circuit Court of Appeals to review the Memorandum

Opinion of the Ninth Circuit Court of Appeals issued on March 12, 1992.

DATED this 24th day of September, 1992.

Jerry K. Boyd
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The Washington Water Power Company

92-546

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

The Washington Water Power Company,

Petitioner,

v.

Spokane Indian Tribe,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Docket No. 91-35000
VOLUME I

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TABLE OF CONTENTS
Volume I

Page

THE UNITED STATES CONSTITUTION
ARTICLE III . . . . . ia
ARTICLE IV . . . . . iia

ACT OF MARCH 3, 1905
[33 Stat. 1006] . . . . . iiia

ACT OF MARCH 2, 1899, Section 3
[30 Stat. 990] . . . . . viia

Section 23(a) of the Federal Power
Act [16 U.S.C. § 816] as of 1985 . xia

Section 23(b) of the Federal Power
Act [16 U.S.C. § 817] as of 1985 xiia

JUSTICE O'CONNOR'S ORDER EXTENDING
TIME FOR FILING PETITION FOR
WRIT OF CERTIORARI TO SEPTEMBER 25,
1992 (Supreme Court of the United
States, dated August 14, 1992) . . 1a

ORDER DENYING PETITION FOR REHEARING
(United States Court of Appeals
for the Ninth Circuit, dated
May 28, 1992) 2a

MEMORANDUM OPINION (United States Court
of Appeals for the Ninth Circuit,
dated March 12, 1992) 4a

ORDER RE WWP AND LITIGATION SCHEDULE
(United States District Court for
the Eastern District of Washington,
dated February 8, 1990) 16a

ORDER DENYING MOTION FOR RECONSIDERATION (United States District Court for the Eastern District of Washington, dated April 5, 1990) 26a

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* (United States Court of Appeals for the Ninth Circuit, dated March 25, 1992) . . 32a

COMPLAINT (United States District Court for the Eastern District of Washington, dated October 13, 1982) 68a

SUPPLEMENTAL AND SECOND AMENDED ANSWER OF THE WASHINGTON WATER POWER COMPANY AND COUNTERCLAIM FOR DECLARATORY JUDGMENT (United States District Court for the Eastern District of Washington, dated October 24, 1989) 94a

MOTION FOR SUMMARY JUDGMENT OF DISMISSAL OF THE CLAIMS OF THE TRIBE BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, AND LACHES (United States District Court for the Eastern District of Washington, dated October 6, 1989) 116a

AFFIDAVIT OF JERRY K. BOYD (United States District Court for the Eastern District of Washington, dated October 3, 1989) 119a

AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 6, 1989 (United States District Court for the Eastern District of Washington) 125a

AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 19, 1989 (United States District Court for the Eastern District of Washington) 137a

AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 25, 1989 (United States District Court for the Eastern District of Washington) 140a

BRIEF OF APPELLEE WASHINGTON WATER POWER COMPANY (United States Court of Appeals for the Ninth Circuit, dated April 11, 1991) 153a

THE UNITED STATES CONSTITUTION

ARTICLE III

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ...

ARTICLE IV

Section. 3. ... The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory of other Property belonging to the Unites States; ...

ACT OF MARCH 3, 1905
[33 Stat. 1006 (1905)]

An Act Providing for the acquirement of water rights in the Spokane River along the southern boundary of the Spokane Indian Reservation, in the State of Washington, for the acquirement of lands on said reservation for sites for power purposes and the beneficial use of said water, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right to the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation may, with the consent of the Secretary of the Interior, be acquired by any citizen, association, or corporation of the United States by appropriation under and pursuant to the laws of the State of Washington.

Sec. 2. That the Secretary of the Interior be, and he hereby is, authorized and empowered to grant such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indians, but which has not been conveyed to the allottee with full power of alienation, or whether the same remains unallotted, on the north bank of the said Spokane River, such as shall be necessary and requisite for overflow rights and for the *erection* of suitable water, electrical, or power plants, *dams,* wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water: — *Provided,* That no lands shall be granted under this Act until after the Secretary of the Interior is satisfied that the person, association, or company applying has made said application in good faith and *with intent*

and ability to use said lands for the purposes above specified and that it requires the quantity of lands applied for in such use, and in case objection to the grant of said land shall be made, the said Secretary shall afford the parties so objecting a full opportunity to be heard.

Sec. 3. That the compensation to be paid for said land by said applicants shall be determined in manner prescribed in Section Three of the Act of March second, eighteen hundred and ninety nine, entitled "An Act to provide for the acquiring of rights of way by railroad companies through Indian Reservations, Indian lands, and Indian allotments, and for other purposes."

Sec. 4. That if the land allotted in severalty to any individual Indian which has not been conveyed to the allottee with full power of alienation be granted to any such appropriator, the Secretary of the

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Interior is empowered to use the moneys received for such land so allotted in the purchase of other suitable lands for such allottee.

Sec. 5. That the Secretary of the Interior shall make all needful rules and regulations not inconsistent herewith for the proper execution and carrying into effect of this Act.

Pub.L. No. 173 ch. 1440, 33 Stat. 1006 (1905) (emphasis added).

ACT OF MARCH 2, 1899
30 Stat., 990

Chap. 374 —An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes.[d]

. . . Sec. 3. That the line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for

[d] This act has been repealed as to the Indian Territory and Oklahoma by section 23 of the act of February 28, 1902, post page 114. That act, sections 13-23, post pp. 114-118, makes general provisions for the construction of railroads through the Indian Territory.

such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvement, held by individual occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made to such occupant or allottee for all property to be taken, or damage done, by reason of the construction of such railroad. In case of failure to make amicable settlement with any such occupant or allottee, such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before competent authority an oath that they will

faithfully and impartially discharge the duties of their appointment, which cath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees can not agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, in case the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned; and if said land is situated in any State or Territory other than the Indian Territory, then to the United States district court for such State or Territory, where the case shall be tried de novo and the judgment for damages

rendered by the court shall be final and conclusive.

When proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this Act. Witnesses shall receive the fees usually allowed by courts within the district where such land is located. Costs, including compensation of the referees, shall be made part of the award or judgment, and be paid by such railroad company.

SECTION 23(a) OF THE FEDERAL POWER ACT
[16 U.S.C. § 816] AS OF 1985

SEC 23. (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided*, That when application is made for a license this section for a project or projects already constructed the fair value of said project

of projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of this applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing. [16 U.S.C. 816.]

SECTION 23(b) OF THE FEDERAL POWER ACT [16 U.S.C. § 817] AS OF 1985

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters

of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed

construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws. [16 U.S.C. 817]

SUPREME COURT OF THE UNITED STATES

No. A-122

Washington Water Power Company,

Petitioner,

v.

Spokane Tribe of Indians, et al.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including September 25th, 1992.

/s/ Sandra Day O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 14th day of August, 1992.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE INDIAN TRIBE, Plaintiff-Appellant, v. STATE OF WASHINGTON; WASHINGTON WATER POWER COMPANY; UNITED STATES OF AMERICA, Defendants-Appellees.	)	No. 91-35000 D.C. No. CV-82-00753-AAM
SPOKANE INDIAN TRIBE, Plaintiff-Appellee, v. STATE OF WASHINGTON; UNITED STATES OF AMERICA, Defendants, and WASHINGTON WATER POWER COMPANY, Defendant-Appellant.	)	No. 91-35472 D.C. No. CV-82-00753-AAM ORDER

Appeal from the
United States District Court
for the Eastern District of Washington

Before: WRIGHT, HUG, and LEAVY, Circuit Judges

The panel, as constituted in the above case, has voted to deny the petition for rehearing. Judges Hug and Leavy have voted to reject the suggestion for a rehearing en banc, and Judge Wright has recommended rejection of the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED: May 28, 1992.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE INDIAN TRIBE, Plaintiff-Appellant, v. STATE OF WASHINGTON; WASHINGTON WATER POWER COMPANY; UNITED STATES OF AMERICA, Defendants-Appellees.	)	No. 91-35000 D.C. No. CV-82-00753-AAM
SPOKANE INDIAN TRIBE, Plaintiff-Appellee, v. STATE OF WASHINGTON; UNITED STATES OF AMERICA, Defendants, and WASHINGTON WATER POWER COMPANY, Defendant-Appellant.	)	No. 91-35472 D.C. No. CV-82-00753-AAM MEMORANDUM*

Appeal from the
United States District Court
for the Eastern District of Washington
Alan A. McDonald,
District Judge, Presiding

Argued and Submitted November 8, 1991
Seattle, Washington

Before:
WRIGHT, HUG, and LEAVY, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The Spokane Tribe of Indians ("the Tribe") brought this action to obtain a declaratory judgment concerning the ownership and title to the bed and northern bank of the Spokane River and the water rights of the river, which lay within the boundaries of the Spokane Indian Reservation.

The district court granted summary judgment in favor of Washington Water Power Company ("WWPC") after finding that the Tribe was collaterally estopped from claiming an ownership interest in the land under the Little Falls Dam and Reservoir by a prior decision in Washington Water Power Co. v. F.E.R.C., 775 F.2d 305 (D.C. Cir. 1985). The order of the district court quieted title in the Tribe to certain of the river bed lands associated with the dam "except for that portion of the above-described river bed, if any, which is finally adjudged, after all

avenues of appeal have been exhausted, to have been conveyed in fee simple to Washington Water Power Co. or its predecessor in interest pursuant to the act of March 3, 1905 (33 Stat. 1006)."

The Tribe appeals from that judgment on the grounds that it is not collaterally estopped from establishing its ownership interest to the entire land in question. WWPC appeals the denial of its motion to amend the judgment so as to quiet title in WWPC to that portion of the property which it maintains was held to have been granted to WWPC in the prior Washington Power decision.

The summary judgment is subject to de novo review. A&A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1414 (9th Cir.), cert. denied, 476 U.S. 1117 (1986); Grigsby v. CMI Corp., 765 F.2d 1369, 1373 (9th Cir. 1985). Summary judgment will be affirmed only

when the record, considered in a light most favorable to the nonmoving party, reveals no genuine issue of material fact and establishes that the moving party is entitled to judgment as a matter of law. A&A Concrete, 781 F.2d at 1414.

The doctrine of collateral estoppel precludes parties from relitigating issues already decided by courts of competent jurisdiction. The party seeking to avail itself of the doctrine "has the burden of showing that the issue for which an estoppel is claimed was actually adjudicated in a prior proceeding." Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980). Because WWPC did not make the requisite showing in this case, we reverse the district court's grant of summary judgment in favor of WWPC and remand this case for a trial on the merits.

Collateral estoppel applies when (1) there is an identity of issues,

(2) the issue to be precluded actually was litigated and decided in the prior action, and (3) deciding the issue was necessary to the court's judgment. Little v. United States, 794 F.2d 484, 487 (9th Cir. 1986). Since none of these elements is present in the instant case, the district court applied the doctrine incorrectly to the Tribe's ownership claim. The proceedings which culminated in Washington Water Power Co. v. F.E.R.C., 775 F.2d 305 (D.C. Cir. 1985), did not address the Tribe's claimed ownership interest in the disputed property. The court in that case merely determined that WWPC was not subject to the licensing requirements of the Federal Power Act, and did not decide whether the Tribe held an ownership interest in the disputed property. Washington Power does not involve a judicial determination of WWPC's precise property interest in the land under the Little Falls Dam.

A mere similarity between past and present issues will not suffice for purposes of collateral estoppel. The doctrine only applies when the issues are identical in fact. Little v. United States, 794 F.2d 484, 487 (9th Cir. 1986); Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 408 (9th Cir. 1985).

The two issues that were resolved in Washington Power were (1) "whether Washington Power prior to June 10, 1920, possessed a 'valid existing right-of-way' to 'operate or maintain [a] dam' at Little Falls on the Spokane River," Washington Power, 775 F.2d at 311, and (2) "whether these rights fall within the exception recognized and granted in sections 23(a) and 23(b) of the Federal Power Act. FPA, 16 U.S.C. §§ 816 and 817." Washington Power, 775 F.2d at 323. Neither issue implicates the Tribe's claimed ownership

interest in the land. Since the ownership issue could be resolved in the Tribe's favor without creating an inconsistency with Washington Power, the Tribe is not collaterally estopped from asserting its ownership claim. WWPC could have a valid right-of-way over land that is owned by the Tribe.

In addition to the difference between the issues raised in the instant case and those raised in Washington Power, collateral estoppel is also inappropriate because the Tribe's ownership interest was never actually litigated during the Washington Power proceedings. Consequently, the second requirement of collateral estoppel is also lacking in this case. Collateral estoppel will not attach to issues which were never actually litigated or to claims precluded from being raised in earlier proceedings. Clark-Cowlitz Joint Operating Agency v.

F.E.R.C., 826 F.2d 1074, 1079 (D.C. Cir. 1987), cert. denied, 485 U.S. 913 (1988); I.A.M. Nat'l Pension Fund v. Industrial Gear Mfg. Co., 723 F.2d 944, 947-49 (D.C. Cir. 1983).

Although the Tribe intervened in the proceedings before the FERC because it believed that its potential ownership interest could be adversely affected during those proceedings, it never had an adequate opportunity to litigate its claim. The FERC granted the Tribe's motion to intervene but then declined to address the issues raised by the Tribe. The FERC stated this outright as follows:

> The resolution of [the Tribe's ownership claim] is beyond the scope of this proceeding. The Presiding Judge has already ruled that the appropriateness of the actions taken by the Department of the Interior or the Secretary would not be determined in this proceeding. These actions will, however, be considered on their face in determining whether WWPC

> received a permit or a valid existing right-of-way prior to June 10, 1920, in accordance with the provisions of Section 23(b) of the Federal Power Act.
>
> . . . The decision will not address questions of land titles, water rights, compensation, or Spokane Tribal rights, since these are clearly extraneous to a determination of the threshold jurisdictional question.

The FERC proceedings were the subject of the appeals that culminated in the Washington Power decision, and the only issue ever litigated during those proceedings was whether WWPC had an interest, any interest, that would trigger the licensing exception in the Federal Power Act.

Finally, we find that collateral estoppel does not bar the Tribe's claim because the third element of the collateral estoppel doctrine also fails. Determining the Tribe's interest in the

disputed property was not necessary to the holding in Washington Power. To determine whether WWPC qualified for the licensing exception to the Federal Power Act, the court only had to determine whether WWPC had obtained an interest or right-of-way prior to 1920. Whether WWPC owned a fee interest, an easement, or a right-of-way was irrelevant for purposes of determining whether WWPC needed to be licensed. Consequently, the Tribe is not collaterally estopped from litigating its claim.

The summary judgment is reversed and the case is remanded to the district court for further proceedings. The appeal by WWPC of the order denying its motion to amend the judgment is moot because of our reversal of the summary judgment. WWPC remains a party in this litigation and the wording of any judgment entered on remand

will be as a result of further proceedings before the district court.

DATED: March 12, 1992.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS, Plaintiff, v. STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY, Defendants.	)	No. C-82-753-AAM ORDER RE WWP AND LITIGATION SCHEDULE

Before the court for resolution are six motions: (1) Defendant Washington Water Power Company's (WWP) Motion for Partial Summary Judgment (I) (Ct. Rec. 18); (2) Plaintiff's Motion for Partial Summary Judgment (Ct. Rec. 81); (3) Defendant WWP's Motion for Summary Judgment (II) (Ct. Rec. 83); (4) Plaintiff's Motion to Strike Affirmative Defenses of WWP (Ct. Rec. 98); (5) Defendant WWP's Motion to Compel Discovery (Ct. Rec. 127); and (6)

Defendant WWP's Motion in Limine (Ct. Rec. 126). All were heard with oral argument on November 9, 1989 in Yakima, Washington. For the following reasons, and for the reasons stated by the court at the conclusion of the hearing, Defendant WWP's second Motion for Summary Judgment is granted; the plaintiff's Motion for Partial Summary Judgment is accordingly denied; and the remaining motions are denied as moot, WWP having now been dismissed from this action.

I.

This action was commenced in 1982 by the Spokane Tribe of Indians (Tribe) primarily for the purpose of obtaining a judgment as to the ownership of the bed of the Spokane River as it lies between the eastern and western borders of the Spokane Indian Reservation. Named as defendants were the State of Washington (State) and WWP. As to WWP specifically,

the Tribe contests the ownership of those lands associated with the construction and operation of the Little Falls Dam and reservoir; see Ct. Rec. 1 at 12, ¶ "3" and "4".

In Washington Water Power Co. v. F.E.R.C., 775 F.2d 305, 336 (D.C. Cir. 1985), the court held:

> The Washington Water Power Company by appropriation acquired the water rights and the lawful right-of-way for the construction of a dam to divert, store and beneficially use the subject waters of the Spokane River and now owns the rights, title, interests, authority and right-of-way necessary for the construction, operation and maintenance of the Little Falls Power Development.

Defendant WWP asserts that based on the doctrine of collateral estoppel, the holding in F.E.R.C. should be given preclusive effect in this proceeding, thus entitling it to summary judgment as to the

Tribe's claim to this portion of the River.

A rather articulate statement of the law of collateral estoppel, or issue preclusion, can be found, ironically enough, in Judge Mikva's dissent in F.E.R.C. at 341:

> The policy behind the doctrines of res judicata and collateral estoppel is to prevent relitigation of issues that were, or should have been, previously tried. See 18 C. Wright, A. Miller & E. Copper, Federal Practice and Procedure § 4403 (1981). One reason for this preclusion is to keep a party from being forced to go through the trouble and expense of relitigating a point is has already won. Id.; United States v. Mendoza, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984). Although there is no longer a firm requirement of mutuality of parties between the two suits, Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), a litigant seeking to invoke collateral estoppel must still show that
>
> (1) the issue must have been actually litigated;

> (2) the issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial; and
>
> (3) preclusion in the second trial must not work as unfairness.
>
> Jack Faucett Associates. Inc. v. American Telephone and Telegraph, 744 F.2d 118, 125 (D.C.Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985), citing Otherson v. Dept. of Justice, INS, 711 F.2d 267, 273 (D.C.Cir. 1983).

Accord Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979); see also University of Tennessee v. Elliott, 478 U.S. 788 (1986).

Upon application of this test to the issue at bar, the court finds the Tribe collaterally estopped from asserting an ownership interest in the land occupied by the Little Falls Dam and reservoir. In particular, the court would note first, on analyzing the F.E.R.C. decision as a

whole, that there can be little doubt that this issue was actually litigated and the conclusion reached necessary to that holding.[1] And second, the court would observe that the very purpose of the Tribe's presence as intervenor in F.E.R.C. was to present its views in this regard. Accordingly, on this basis, and for the reasons stated by the court at oral argument,

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[1] See, e.g., F.E.R.C., 775 F.2d at 323:

> Having settled that the 1905 Act authorized the Secretary to grant parties the necessary right of way and approval to build, maintain, and operate the Little Falls Facility, 'in the Spokane River along the southern boundary of the Spokane Indian Reservation,' see n.2, the central question of this case becomes whether these rights fall within the exception recognized and granted in sections 23(a) and 23(b) of the Federal Power Act.

IT IS HEREBY ORDERED, pursuant to Fed. R. Civ. P. 56, that Defendant WWP's second Motion for Summary Judgment be GRANTED.

Based on the foregoing, IT IS FURTHER ORDERED that the plaintiff's Motion for Partial Summary Judgment, which deals strictly with that portion of the River being claimed by WWP, be DENIED.

WWP now no longer a party to this action, IT IS FURTHER ORDERED that defendant WWP's first Motion for Partial Summary Judgment, Motion to Compel Discovery, and Motion in Limine, as well as the plaintiff's Motion to Strike, be DENIED AS MOOT.

II.

Remaining for resolution in this matter is any interest the Tribe may have in that portion of the bed of the Spokane River adjacent to its reservation, exclusive of the Little Falls Dam and

reservoir, vis-a-vis the State of Washington; see Complaint, Ct. Rec. 1 at 11-12, ¶ "1" and "2."[2] As to those issues, the following schedule shall apply:

(1). The non-jury trial shall commence on July 23, 1990 at 9:30 a.m. in Spokane, Washington.

(2). All discovery shall be completed on or before May 25, 1990. The parties shall file no discovery materials except as necessary to support motions.

(3). Each party shall file and serve a final witness list on or before June 1, 1990. These lists shall contain the name, address and a summary of each witness' testimony. These lists shall not be supplemented, except for rebuttal, without leave of the court to prevent manifest

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[2] Based upon counsel's representation at the November 9, 1989 hearing, the State now disclaims any interest in that portion of the Spokane River bed being claimed in this action by WWP.

injustice. The discovery costs, including attorney fees, of any witness listed but not called to testify shall be borne by the party and/or attorney so listing the uncalled witness, subject to review by the court to prevent a manifest injustice. Objections to witnesses shall be filed and served on or before June 8, 1990, along with a brief summary of the basis for the objection(s).

(4). Final exhibit lists shall be filed and served and exhibits made available for inspection (or copies provided) on or before June 1, 1990. Objections to exhibits shall be filed and served on or before June 8, 1990, and two copies of the exhibit(s) to which objections are filed shall be furnished by counsel, together with a brief summary of the basis for the objection(s). All exhibits shall be pre-marked BY COUNSEL. Plaintiff shall utilize exhibit numbers 1

through 99. Defendant(s) shall utilize numbers 100 through 199.

(5). All motions shall be served, filed and disposed of prior to June 22, 1990.

(6). The pretrial conference will be held on July 6, 1990, at 11:00 a.m., in Yakima, Washington. If an agreed Pretrial Order has been lodged prior to that date, counsel need not appear at the pretrial conference.

(7). Trial briefs and proposed Findings of Fact and Conclusions of Law shall be filed and served on or before July 16, 1990.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DONE BY THE COURT this 5th February, 1990.

ALAN A. McDONALD
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS, Plaintiff, v. STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY, Defendants.	)	No. C-82-753-AAM ORDER DENYING MOTION FOR RECONSIDERATION

Before the court for resolution without oral argument is the plaintiff's Motion for Reconsideration (Ct. Rec. 140). Although no Notice of Hearing was filed, it appears to the court that the record is now complete and thus that this matter is ripe for disposition.

By an order entered February 8, 1990, the court granted Defendant WWP's motion for summary judgment on the basis of collateral estoppel, or issue preclusion. Ct. Rec. 138. Specifically, the court

found that the question of the ownership of the Spokane River bed as it lies upstream from the Little Falls Dam and reservoir to the eastern border of the Spokane Indian Reservation was decided in favor of WWP in Washington Water Power Co. v. F.E.R.C., 775 F.2d 305 (D.C. Cir. 1985). Id. at 2-4. See also Transcript of Proceedings, Ct. Rec. 139. The plaintiff now moves for reconsideration of that ruling pursuant to Fed. R. Civ. P. 54(b).

As stated by the plaintiff,

> [t]he issue [presented by this motion] is whether the 1905 Act and the grants that the Secretary of Interior was authorized to make under that Act were intended by Congress to accomplish a taking of the Tribe's entire ownership interest in the lands referred to in the grants, as TWWPC contends, or whether such grants were intended only to provide a right-of-way license or easement over and across tribal lands with the underlying ownership interest retained by the federal government held in trust for the Plaintiff Spokane Tribe of

> Indians as the Spokane Tribe contends.

Ct. Rec. 141 at 3. As the court held previously, it finds the former characterization to be the holding of the court in F.E.R.C.

The court is cognizant of the fact that, as a threshold matter, the issues presented for resolution in F.E.R.C. differed from those presented here. In F.E.R.C., the precise issue before the court was whether WWP was granted a "valid existing right-of-way [to operate the Little Falls hydroelectric development] . . . prior to June 10, 1920" so as to exempt WWP from the licensing requirements of the Federal Power Act. 775 F.2d at 310-11 (emphasis omitted) (quoting § 23(b) of the Act, 16 U.S.C. § 817). But in deciding that issue, the F.E.R.C. court did not simply decide whether or not WWP was granted such a right-of-way; instead,

it chose to analyze the question by determining first what interest, if any, WWP had in this land, and second, whether such interest constituted a right-of-way for purposes of the Act. In deciding the first question, the court relied heavily on the language contained in the Act of March 3, 1905 (which is reproduced in its entirety at 308-9 n.2), which provides "for the acquirement of water rights . . . [and] lands on said reservation for sites for power purposes" (emphasis supplied).[1] See F.E.R.C., 775 F.2d at 308-10. Upon review of the 1905 Act, and the acts

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[1] See also Sec. 2 of the 1905 Act ("the Secretary of the Interior [is] authorized and empowered to grant such appropriator . . . land on said reservation . . . as shall be necessary and requisite . . . for the erection of suitable water, electrical, or power plants, dams, wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water") (emphasis supplied); Sec. 3 (providing that compensation be paid to the Tribe for lands acquired pursuant to this Act by those acquiring it).

performed by WWP pursuant to that Act, the court concluded at 336:

> (1) The Washington Water Power Company . . . now owns the rights, title, interests, authority and right of way necessary for the construction, operation and maintenance of the Little Falls Power Development; [and] (2) prior to June 10, 1920 such rights, etc., were acquired and granted in accordance with the special Act of March 3, 1905 . . .

From these findings, the court then concluded, also at 336, that "(3) the continuous operation and maintenance of the Little Falls Power Development by the Washington Water Power Company is exempted from the application of the Federal Power Act by sections 23(a) and (b)." It was thus necessary to the decision in F.E.R.C. that WWP was granted, pursuant to the 1905 Act, all Reservation land essential for the construction and operation of the Little Falls hydroelectric development, as that finding served as the basis for its

finding that such interest constituted a right-of-way over such land for purposes of the Federal Power Act. The court therefore again finds the plaintiff collaterally estopped from relitigating the issue of the ownership of this property and all rights appurtenant thereto; see Restatement (Second) of Judgments § 27. Accordingly,

IT IS HEREBY ORDERED that the plaintiff's motion for reconsideration be DENIED.

IT IS SO ORDERED. The Clerk is directed to enter this order and forward copies to counsel.

DATED: April 5, 1990.

ALAN A. McDONALD
United States District Judge

No. 91-35000 - No. 91-35472

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPOKANE TRIBE OF INDIANS,
Plaintiff/Appellant,
vs.
STATE OF WASHINGTON;
WASHINGTON WATER POWER COMPANY;
UNITED STATES OF AMERICA,
Defendants-Appellees.

* * *

SPOKANE INDIAN TRIBE,
Plaintiff-Appellee,
vs.
STATE OF WASHINGTON;
UNITED STATES OF AMERICA,
Defendants,
and
WASHINGTON WATER POWER COMPANY,
Defendant-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
Alan A. McDonald, District Judge, Presiding
D.C. No. CV-82-00753-AAM

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC*
THE WASHINGTON WATER POWER COMPANY
Appellee and Appellant
APPENDIX ATTACHED

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TABLE OF CONTENTS

	Page(s)
I. PETITION FOR REHEARING.	35
A. STATEMENT OF ISSUES PRESENTED FOR REHEARING . .	35
B. SUBJECT MATTER AND APPELLATE JURISDICTION . .	38
C. STATEMENT OF THE CASE . . .	39
II. RELIEF SOUGHT	49
III. BASIS FOR PETITION FOR REHEARING	50
IV. ARGUMENT	52
V. CONCLUSION	65

* * *

APPENDIX ATTACHED

TABLE OF AUTHORITIES

Cases: **Page(s)**

United States Supreme Court Cases:

University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986) . 49, 53-57, 60, 61, 64-66

Washington v. Yakima Indian Nation, 439 U.S. 463, 476 at n. 20, 58 L.Ed.2d 740, 99 S.Ct. 740 (1979) 62

Other Federal Decisions:

Harris v. Jacobs, 621 F.2d 341 (9th Cir. 1980) . . 56

Little v. United States, 794 F.2d 484 (9th Cir. 1986) . . 56

United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D.Wash 1941) . 38, 45, 46

Washington Water Power Co. v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C.Cir. 1985) passim

Statutes and Regulations:

Federal statutes:

28 U.S.C. § 1738) 55

28 U.S.C.A. § 1291 (1986) 39

28 U.S.C.A. § 1331 (1986) 39

28 U.S.C.A. § 1362 (1986) 39

Other Authorities:

Act of March 3, 1905 [33 Stat. 1006] 39

I. PETITION FOR REHEARING.

A. STATEMENT OF ISSUES PRESENTED FOR REHEARING.

1. Did the Memorandum decision filed by this Court on March 12, 1992, properly apply the doctrine of collateral estoppel? Is the Spokane Indian Tribe barred by the doctrine of collateral estoppel or issue preclusion from re-litigating the issues of fact and law decided in Washington Water Power Co. v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C.Cir. 1985) (hereafter "WWP v. FERC") since the Spokane Indian Tribe provoked the proceeding which culminated in WWP v. FERC, was a full participating party in the WWP v. FERC proceeding, and where the substantive rights of WWP were at issue and were resolved?

2. Should this Ninth Circuit Court of Appeals have reversed the judgment and decision of the district court which was

at issue in Circuit Court Docket No. 91-35472? Where a judgment quieting title to WWP's property was obtained by Tribal ex parte communications with the district court without notice to WWP, should this Circuit Court have clearly rebuked such *ex parte* communications and clearly reversed the judgment of the district court rather than simply ruling that "the appeal by WWPC of the order denying its motion to amend the judgment is moot..."?

3. Should the opinion of this Circuit Court be clarified with respect to the following:

(a) the application of the doctrine of issue preclusion to bar the Tribe from re-litigating the lawfulness of the construction, operation and maintenance of the Little Falls Development;

(b) the application of the doctrine of issue preclusion to bar the Tribe from claiming any damages from WWP for conduct which was authorized by Congress and the Secretary of the Interior as decided in WWP v. FERC;

(c) the application of the doctrine of issue preclusion to bar the Tribe from re-litigating all issues of fact and law decided by the D.C. Circuit Court of Appeals in WWP v. FERC;

(d) the application of the doctrine of issue preclusion to bar the Tribe from re-litigating any issue relating to WWP's ownership of a limited fee with implied reverter for non-use, as concluded in WWP v. FERC, *supra* at 325, and also in United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D.Wash 1941);

(e) to reverse the judgment and decree quieting title to property in the Tribe with respect to WWP's property and to hold that the *ex parte* communications of the Tribe with the court without notice to WWP were clearly unlawful and in violation of WWP's rights.

B. SUBJECT MATTER AND APPELLATE JURISDICTION.

The above-entitled matter arose by virtue of a complaint filed by the Spokane Indian Tribe. The district court had original jurisdiction under 28 U.S.C.A. § 1362 (1986). In addition, the issues raised involved rights acquired by WWP under a Congressional Act of March 3, 1905 [33 Stat. 1006]. In addition, the Tribe makes claims under an Executive Order of the President of the United States and under case law of the federal courts. Therefore, the matter involves issues

arising under the Constitution and laws of the United States, and the district court had jurisdiction under 28 U.S.C.A. § 1331 (1986). Finally, the matter involves an appeal of a final decision of a district court. Therefore, this Circuit Court of Appeals has jurisdiction under 28 U.S.C.A. § 1291 (1986).

C. STATEMENT OF THE CASE.

1. History of Proceedings.

This case arose from the same facts and issues that were presented to the Federal Energy Regulatory Commission (FERC) and to the D.C.Circuit Court of Appeals in WWP v. FERC. In the district court below, the Tribe sought a declaration of its title to WWP's lands along the Spokane River and sought damages for WWP's construction, operation and maintenance of WWP's Little Falls Hydroelectric Development (Supp. Excerpt at 447, 458), which power project was at

issue and was fully discussed in WWP v. FERC. All of the relevant facts and issues are fully discussed in WWP v. FERC with the exception concerning the facts relating to collateral estoppel and the manner in which that issue arose in the district court.

In the district court below, WWP moved for summary judgment and argued that the Tribe was barred from contesting WWP's title and was barred from claiming damages based upon the doctrine of collateral estoppel. WWP claimed that all of the material facts and legal issues concerning WWP's legal rights to construct, operate and maintain the Little Falls Development were fully litigated and decided in WWP v. FERC. The district court granted WWP's motion for summary judgment based upon collateral estoppel and dismissed tne Tribe's complaint against WWP. The Tribe also sought a declaration of title against

the State of Washington. In subsequent proceedings, the remaining issues against the State of Washington were set for trial and ultimately resolved. Finally, through *ex parte* communications with the court and without notice to WWP, the Tribe sought and obtained a stipulated judgment (stipulation between the State of Washington and the Tribe to the exclusion of WWP) and obtained a judgment quieting title to the property claimed by WWP. Upon receiving notice of the entry of such judgment, WWP objected to such judgment and moved to amend such judgment to exclude WWP's property. The district court held that the judgment quieting title did not apply to WWP but denied WWP's motion to amend the judgment to exclude WWP's property. Copies of all of the decisions of the district court are attached as appendices to this Brief.

The Tribe appealed the summary judgment of dismissal of the complaint in Circuit Court Docket No. 91-35000. WWP appealed the judgment quieting title in the Tribe to WWP's property in Circuit Docket No. 91-35472.

2. Facts.

The relevant and material facts are summarized and stated in Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C.Cir. 1985) (again, hereafter "WWP v. FERC"). Where relevant, citations will be made to WWP v. FERC with respect to certain facts. A copy of WWP v. FERC is attached at Appendix __ for ease of reference.

In WWP v. FERC, the Spokane Tribe of Indians was an intervenor (p. 305). WWP was represented by Robert D. Dellwo, the same Robert D. Dellwo in the law firm that represented the Tribe before the district court and the circuit court (p. 307). In

WWP v. FERC, WWP claimed it constructed, operates and maintains the Little Falls Project under the authority of a Special Act of Congress approved on March 3, 1905. In 1905, David Wilson, a private developer, wanted to develop a power site on the Spokane River, part of which was within the Spokane Indian Reservation (p. 308). Mr. Wilson petitioned his representative in Congress who sponsored a bill to provide for acquiring water rights and land for power site purposes (pp. 308-309). The law is set forth in full at page 309. David Wilson appropriated water and the Secretary of the Interior "acting in accordance with the 1905 Act, granted the 100 acres and the right to use the waters" to David Wilson (p. 309). David Wilson's lands and water rights were sold to WWP in 1907 and in 1908, WWP began construction of the Little Falls Development. *Id.* In 1908, WWP purchased an

additional eight acres for the Little Falls Development (p. 310). WWP's Little Falls Dam began producing electric power in 1910. *Id.* The D.C. Circuit Court of Appeals held that WWP was not required to apply for or obtain any additional license or authority to continue to operate and maintain the existing Little Falls Project. *Id.* The 1905 Act authorized David Wilson and WWP to appropriate water by complying with Washington state law for a hydroelectric development (p. 312).

The 1905 Act provided the exclusive means for compensation to be paid to the Spokane Indians (p. 313). The 1905 Act finally provided for the granting of land and permanent land rights that may be necessary to construct, operate and maintain a power project such as the Little Falls Development. *Id.* The land rights included the bed of the river. *Id.* and p. 316. The land rights included the

bed of the river. *Id.* and pp. 317-318. Such rights included the right to excavate and construct a dam and to store and divert waters of the Spokane River at Little Falls (p. 319). The grant to David Wilson which was sold to Water Power included the land and the water rights. *Id.* at p. 320. It should be noted that the nature of the rights acquired under the 1905 Act was litigated and determined in United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D.Wash. 1941).

It is clear that the D.C. Circuit Court determined that the 1905 Act authorized the Secretary of the Interior to grant lands to Mr. Wilson and thereafter to WWP. *See* Section 2 of the Act of 1905 shown in note 2 on page 309, and *see* page 325. It is further clear that the District of Columbia Circuit Court of Appeals concluded that WWP owns real property and that the nature of such real

property is a "transferrable limited fee currently held by the Company." Page 325. The District of Columbia Circuit Court stated that:

> Thus the Commission proposes actually to obliterate the right of way for the beneficial use of its water rights that the Company currently holds, a limited fee with implied reverter for non-use, *see Big Bend Transit Co.*, 42 F.Supp. 459 (E.D. Wash. 1941), by forcing it [WWP] to apply for a license to run for a 50-year term, at the end of which the right to maintain and operate the dam would be up for license.

Id. It is also clear that the Circuit Court concluded that from 1911 on, WWP had all of the authority and rights necessary for the construction, operation and maintenance, and for the continuing operation and maintenance of the Little Falls Project. Page 326 and pages 335 and 336. The D.C. Circuit Court of Appeals finally concluded that:

> The Washington Water Power Company by appropriation acquired the water rights and the lawful right of way for the construction of a dam to divert, store and beneficially use the subject waters of the Spokane River and *now owns the rights, title, interest, authority and right of way necessary for the construction, operation and maintenance of the Little Falls development* ...

It also is clear that the D.C. Circuit Court concluded that WWP now holds a limited fee with an implied reverted for non-use to the Little Falls development site. Page 325.

In 1989, WWP moved for summary judgment based upon collateral estoppel and issue preclusion based upon the decision in WWP v. FERC. The District Court ruled in favor of WWP and issued an order dated February 8, 1990, and an Order Denying Motion for Reconsideration dated April 5, 1990, copies of which are attached and are set forth in the Excerpt in appeal Docket No. 91-35472, pages 31-36

and pages 63-66, as Appendices __ and __, respectively. On September 14, 1990, the Tribe obtained, by *ex parte* communications with the court, a "Judgment and Decree Confirming Disclaimer and Quieting Title to Property." Excerpt at 102, a copy of which is attached, Appendix __. WWP moved the court to alter and amend judgment, which motion was denied by the court. The motion is in the excerpt at page 111. The order denying WWP's motion is set forth in Excerpt at 143 and is attached in the Appendix.

II. RELIEF SOUGHT

WWP seeks rehearing of the issues relating to collateral estoppel and issue preclusions, and particularly seeks an order of this Court ruling that all of the facts and issues of law decided by the court in WWP v. FERC are binding on the Tribe in the proceedings which are the subject matter before this Court. WWP

believes that the court erred in issuing its memoranda relating to collateral estoppel and in reversing and remanding the matter, in light of the decision of the United States Supreme Court in University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986). WWP urges this Court to clarify its decision relating to the application of the doctrine of collateral estoppel as it relates to the facts and issues of law decided in WWP v. FERC. Finally, WWP urges this Court to expressly reverse and remand the Judgment and Decree Quieting Title in the Tribe to WWP's property. The effect and decision of this Court is perhaps unclear as it relates to Appeal No. 91-35472. (It should be noted that the Tribe and WWP have filed a cost bill for both appeal Docket No. 91-35000 and Docket No. 91-35472.) The undersigned attorneys believe that this Court intended to

reverse the District Court in Appeal No. 91-35472.

III. BASIS FOR PETITION FOR REHEARING

1. The memorandum of the court "overlooked" material points of fact and law in its decision.

2. There is an apparent conflict between the decision of the Ninth Circuit Court of Appeals and the decision of the D.C. Circuit Court of Appeals in WWP v. FERC.

3. The memorandum of the court did not clearly reverse the District Court in Appeal No. 91-35472, even though such reversal appears to have been intended and under the facts and law and is clearly required.

The undersigned attorneys believe that the above stated situations exist in this Court's Memorandum filed on March 12, 1992. Furthermore, the undersigned attorneys believe that the full court

should consider the issues that are raised, particularly as they relate to the application of the doctrine of issue preclusion where a detailed and substantial administrative hearing and court opinion has been issued dealing with the same facts and the same issues of law and particularly where such court opinion is issued by a sister Circuit Court of Appeals in a proceeding which was provoked by the party against whom the doctrine of issue preclusion is to be applied. Furthermore, WWP contends that the Memorandum of this Court filed on March 12, 1992, either directly conflicts or could lead to an opinion which conflicts and would substantially affect the opinion of another court. There is a need for substantial uniformity in the application of the doctrine of issue preclusion. Finally, the memorandum of this Court filed on March 12, 1992, may encourage

persons to engage in conduct similar to the conduct of the Tribe in conducting *ex parte* communications with a district court and in obtaining *ex parte* judgments and orders with no rebuke and not even with an express reversal by this Court. Therefore, WWP has suggested that this matter should be reheard *en banc*.

IV. ARGUMENT

The first and foremost argument made by WWP in this case is based upon the claim by WWP that the Tribe should be barred by the principals of issue preclusion in prior decisions and fact determinations from making claims for money damages and claims of title to property inconsistent with WWP's rights, title and interest that were clearly at issue and were decided in WWP v. FERC. WWP bases its argument on the principals of issue preclusion which were established in

University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986) (hereafter cited as "*Elliott*"). *Elliott* involved two proceedings -- a state administrative proceedings and a proceeding before a federal district court. *Id.* at 790. In Elliott,

> [t]he ALJ [Administrative Law Judge] held that he lacked jurisdiction to adjudicate respondent's federal civil rights claims, but did allow respondent to present, as an affirmative defense, evidence that the charges against him were actually motivated by racial prejudice and hence not a proper basis for his proposed discharge."

Id. at 791. This is substantially analogous to the same situation that was described by this Court in its Memorandum at page 6. A copy of this Court's Memorandum is attached in the Appendix as Appendix __. In Elliott, the ALJ found "that the charges were not racially motivated in a labor dispute." *Id.* In Elliott, the plaintiff did not seek review

of the administrative proceeding but rather returned to the federal district court to pursue his civil rights claims. *Id.* at 792. In Elliott, the University moved for summary judgment "on the ground that respondent's suit was an improper collateral attack on the ALJ's ruling, which petitioner [University] contended was entitled to preclusive effect." *Id.* at 792. The U.S. Supreme Court granted *certiorari* to consider whether the "State administrative fact finding is never entitled to preclusive effect in actions under Title VII or the Reconstruction Civil Rights statutes." *Id.* at 794.

In Elliott, the United States Supreme Court recognized that "we have frequently fashioned federal common-law rules of preclusion in the absence of the a governing statute." *Id.* The court concluded that a preclusion statute (28 U.S.C. § 1738) did not bar giving

preclusive effect to administrative agency decisions and that the court should consider whether the "rule of preclusion is appropriate ... ." *Id.* at 794-795. The court discussed the reasons for and the advantages and the desirability of precluding re-litigation of issues where such issues have been previously litigated. *Id.* at 798-799. Therefore, the court, in Elliott stated:

> We hold that when a state agency 'acting in a judicial capacity ... resolves disputed issues of fact properly before it when the parties have had an adequate opportunity to litigate,' (citation omitted) federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts.

Id. at 799.

It is the principles and doctrine of issue preclusion of the facts and law which WWP contends that this Court erroneously applied in its Memorandum filed on March 12, 1992. WWP urges the

Court to follow the federal common-law principles expressed and explained in Elliott and apply those principles to this case.

In its Memorandum, this Court has followed a strict construction approach concerning the application of the doctrine of collateral estoppel. The Court cited Harris v. Jacobs, 621 F.2d 341 (9th Cir. 1980), and Little v. United States, 794 F.2d 484 (9th Cir. 1986). It does not appear that either of the cases cited or this Court in this case considered or dealt with preclusion issue as discussed in Elliott. Rather, this Court made a cursory determination that the D.C. Circuit Court "merely determined that WWPC was not subject to the licensing requirements of the Federal Power Act, and did not decide whether the Tribe held an ownership interest in the disputed property." Memoranda at page 4. This

Court went on to conclude that WWP v. FERC did not "involve a judicial determination of WWPC's *precise* property interest in the land under the Little Falls Dam." *Id.* This Court's Memorandum begs the question. What is obvious from the opinion in WWP v. FERC is that the "precise" issue before the court was whether or not WWP had all of the rights, title and interests necessary for the construction, maintenance and operation of the Little Falls Project. As discussed in the Statement Of The Case above, the D.C. Circuit Court determined WWP's rights, title and interest in order to determine whether or not the Little Falls Project was exempt from licensing under the Federal Power Act. What is clear from WWP v. FERC and what cannot be disputed is that the D.C. Circuit Court determined that WWP had all of the rights, title and interest necessary for the construction,

operation and maintenance of the Little Falls Project and that granting of such rights by the Secretary of the Interior was authorized by Congress and that the Secretary of the Interior did grant such rights and that WWP's construction, operation and maintenance of the Little Falls development was wholly lawful and therefore, of necessity, WWP was not required to license the Little Falls Project under the Federal Power Act. *See* the Statement Of The Case, above. The record that was before the FERC and before the court in WWP v. FERC is substantially discussed in WWP v. FERC, which record was also presented to the District Court below, the relevant parts of which were presented to this Court in the Supplemental Excerpts filed by WWP in Docket No. 91-35000 and the Excerpt filed in Docket No. 91-35472. In addition, the FERC record was substantially addressed in

the briefs filed by WWP in the aforementioned appeals. Finally, the Act of 1905, which is the genesis of WWP's rights, title and interest, was discussed in great detail, of necessity, in WWP v. FERC. The legal effects of such statute, when applied to the facts presented to this Court, led this Court to determine the issues of fact and law, including some discussion of the nature of WWP's "precise property interest in the land." WWP v. FERC, *supra* at 325.

Finally, of necessity, the court in WWP v. FERC determined that WWP's construction, operation and maintenance of the Little Falls development is lawful under lawful rights granted by the federal government pursuant to an act of Congress. If the actions and conduct of WWP were once determined to be lawful and pursuant to an Act of Congress after a full opportunity to litigate was given to the

Tribe and to the United States government in an administrative proceeding and before the D.C. Circuit Court of Appeals, isn't the Tribe now be barred from re-litigating its claim for damages with respect to the construction, operation and maintenance of the Little Falls Project under the principles of issue preclusion expressed in *Elliott* are applied? If the strict construction espoused in the Memoranda are followed, unless the pleadings or the issues that are presented appear to be *precisely* the same issues that have been presented in a prior proceeding, it does not appear that any party will ever be precluded from re-litigating issues. The only barrier will be the ability of an attorney to conjure up some distinction between the "precise" issues presented in the first proceeding and the "precise" issues presented in a second proceeding. Such strict construction completely

eviscerates the apparent principles laid down in Elliott.

The strict construction of the doctrine of collateral estoppel determined by this Court in its Memoranda seems to be more akin to the doctrine of "*res judicata*" rather than the doctrine of collateral estoppel or issue preclusion. It is suggested that under the principles of issue preclusion expressed in Elliott, all factual determinations and legal issues decided in WWP v. FERC should be considered to preclude any further litigation concerning such issues. If this Court, upon consideration of this Petition or Rehearing, still concludes that the Tribe may still litigate the "precise property interest" held by WWP or the Tribe, the other claims for damages of the Tribe with respect to the construction, operation and maintenance of the Little

Falls Project should be held to be precluded and determined in WWP v. FERC.

WWP can defend against the Tribe's appeal on any ground properly raised below regardless of the ruling of the District Court. Washington v. Yakima Indian Nation, 439 U.S. 463, 476 at n. 20, 58 L.Ed.2d 740, 99 S.Ct. 740 (1979). Failure to give preclusive effect to the determinations made by the D.C. Circuit Court of Appeals in WWP v. FERC may ultimately lead to a complete evisceration of the decision in WWP v. FERC. For example, if the District Court, on remand, is not bound by the determinations in WWP v. FERC, the District Court conceivably could rule that WWP never acquired all of the rights, title and interests that were necessary for WWP's construction, operation and maintenance of the Little Falls development. If WWP did not have all of the rights that were necessary for the

construction, operation and maintenance of Little Falls, then Section 23 of the Federal Power Act would not exempt the project from licensing and then WWP could then be required to go back to the FERC and license the Project under the Federal Power Act. It is clear that in *WWP v. FERC*, WWP and the Tribe and the United States has already litigated that issue. How or why should WWP be further exposed to liability and loss of its property through litigation in a second forum? WWP v. FERC, *supra* at 325. This appears to be clearly inconsistent with the principles of issue preclusion laid down in Elliott. Therefore, this Court should rehear and reconsider its Memorandum decision issued on March 12, 1992, with respect to Docket No. 91-35000.

Finally, this Circuit Court should clarify its decision with respect to Docket No. 91-35472. That appeal deals

with a judgment and decree entered by the District Court upon *ex parte* communications made by the Tribe. As explained in WWP's initial brief and reply brief, such conduct on the part of the Tribe was clearly unlawful and improper and in violation of various rules of court, and in violation of WWP's rights. In its Memorandum at page 7, this Court simply stated that WWP's appeal is "moot because of our reversal of the summary judgment." Furthermore, the court stated that "the wording of any judgment entered on remand will be a result of further proceedings before the District Court." Although the effect may be clear, it is urged that with respect to Docket No. 91-35472, the Memorandum should clearly show that the judgment and decree entered by the Court in September 1990 is reversed and remanded for further considerations consistent with the opinion of the Court.

V. CONCLUSION

This Court should give further consideration to the issues raised in Docket No. 91-35000 concerning the federal common-law of issue preclusion, the principles of which were discussed in University of Tennessee v. Elliott, 478 U.S. 788, 796-799, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986). The record before this Court and the decision in WWP v. FERC clearly shows that the facts and legal issues which are at the heart of this case were litigated by the parties, including the Spokane Tribe of Indians and WWP, before the FERC and before the D.C. Circuit Court of Appeals. In WWP v. FERC, the Spokane Tribe was the real party in interest as recognized by the dissent at page 341. Following the principles of issue preclusion laid down in Elliott, certainly all of the facts and legal issues decided in WWP v. FERC should be

given preclusive effect by this Court, and if there are any remaining issues to be remanded to the District Court, then by the District Court in its subsequent proceedings. Finally, the Memorandum filed on March 12, 1992, should be clarified to show that the judgment and decree at issue in Docket No. 91-35472 was reversed, and if deemed necessary, remanded to the District Court for further proceedings.

DATED this 25th day of March, 1992.

PAINE, HAMBLEN, COFFIN, BROOKE
& MILLER

By_____
Jerry K. Boyd
Attorneys for
defendant/appellee
Washington Water Power Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF EASTERN WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	
v.	)	COMPLAINT
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	
Defendants.	)	

The Spokane Indian Tribe, by and through the undersigned, petitions and alleges:

1. The Spokane Tribe of Indians, hereinafter referred to as the "Tribe" or the "Spokane Tribe" is a federally recognized Indian Tribe formally and legally organized with a Constitution adopted by its members and approved by the Department of Interior. The Tribe is authorized to bring this action in this Court and the Court has jurisdiction to

litigate its claims herein by virtue of 28 USC 1331 and 1362.

2. Before federal recognition and formal organization the Spokane Tribe existed from time immemorial - fully recognized and acknowledged to be a Tribe by the earliest settlers, trappers, missionaries and governmental representatives. At the time of the first visits of the white man to this area it was composed generally of three main bands or sub groups now identified as the "Upper, Middle and Lower Spokanes," but constituted a single Tribe.

3. From time immemorial the Tribe and its members, bands and groups occupied as their aboriginal lands approximately 4,500,000 acres of land bounded on the west by the Columbia River, on the east by the Pend Oreille River, on the north by a line roughly approximating the present international boundary between the United

States and Canada and on the south and southeast by a geographic line roughly extending from what is now the center of the Spokane Valley - to Rockford, south to Tekoa, west through Spangle and circling to the south and west of Ritzville and back to the Columbia River. This occupation of that vast territory by the Tribe was from the earliest of times recognized by other Tribes, by geographers and historians and by the United States government as conclusive evidence of the Tribe's aboriginal ownership of those lands. While the Spokane Tribe historically permitted neighboring Tribes to visit and utilize its lands, it too visited and utilized the lands of these other Tribes particularly in hunting and gathering expeditions into what is now Idaho and Montana.

4. Beginning in the early 1800's and accelerating during the rest of the

Nineteenth Century, there was a rapidly increasing influx of white explorers, hunters, fishermen, trappers, missionaries, farmers, business entrepreneurs and other settlors into these Tribal aboriginal lands. Most of the cities and towns now located therein were begun. These people were United States citizens coming to what they considered "their" new country and establishing claims of ownership through squatting, residence, mining claims, railroad rights-of-way, homestead entry and through every method and means available to those early people to seek ownership or occupancy rights in portions of Tribal lands.

5. Contingents of the United States Army came to the area establishing forts and headquarters from which to explore and control the lands and their Indian and non-Indian residents. The combination of all these non-Indian people and their

federal protectors eventually constituted a powerful political force upon the United States government to seek the extinguishment of Indian title and to establish a Reservation to which to sequester and maintain the Tribe.

6. During this time the Tribe and its chiefs were attempting to cope with the influx of non-Indians and non-Indian interests which were effectively gobbling up and preempting large ares of their homeland so that in many cases they were being driven off and excluded from their own homes. They anticipated the inevitable loss of their lands and communicated to the United States authorities their desire for the establishment of a Reservation in which their land rights, though vastly reduced, would be protected in perpetuity.

7. At the request of the Tribe the United States government in 1877 sent a

parley commission headed by United States Indian Inspector E. C. Watkins to Spokane Falls, Washington, to conduct a parley with the Spokane Indians the purpose of which was to gain their cession of their aboriginal lands in return for the establishment of a Reservation on the key portion thereof. The parley, conducted in Spokane August 16 through August 18, 1877, resulted in the following agreement:

"Council at Spokane Falls, W. T.

August 18th, 1877

We the undersigned chiefs and headmen of the Spokane Tribe of Indians for ourselves and for our people hereby agree to accept for ourselves the following described land for our Reservation:

Beginning at the source of the Chamokane Creek in Washington territory, thence down said creek to the Spokane River, thence down said river to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

And we do further agree to go upon the same by the first of

> November next, with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the government and abide by all laws of the same, and obey orders of the Indian Bureau and the officers acting thereunder.
>
> Signed by the Representatives of the United States Government and the Assembled Chiefs and Headmen of the Spokane Tribe"

8. The new Reservation, as described in the Agreement, was fully recognized and approved by the Secretaries of War and Interior. It became evident, however, that notwithstanding its establishment non-Indians were encroaching and settling even in the lands it enclosed. Because it included only about a thirty mile segment of the Spokane River and eight miles of the Columbia, it did not secure to the Spokanes their valued fishing sites on the upper Spokane and especially on the Columbia River to the

north including a primary fishing site at Kettle Falls. Additional negotiations continued by spokesmen for the Tribe that it be extended and enlarged to the north so as to include more of the Columbia River up to Kettle Falls thereby securing to the Spokanes a greater portion of the river for their use as an artery of commerce and as a fishery.

9. The War Department, seeking a further formalization of the Reservation, issued on September 3, 1989, the following order:

"HEADQUARTERS DEPARTMENT OF THE COLUMBIA

In the Field, Spokane Falls, Washington, September 3, 1880

Whereas in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians the following described territory, to-wit: Commencing at the mouth of Cham-a-kane Creek, thence north 8 miles in direction of said creek, thence due west to the Columbia River, thence along the

Columbia and Spokane Rivers to the point of beginning - the Indians are still expecting the Executive order in their case, and are much disturbed by the attempts of squatters to locate land within said limits: It is hereby directed that the above-described territory, being still unsurveyed, be protected against settlement by other than said Indians until the survey shall be made, or until further instructions. This order is based upon plan necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The commanding officers of Fort Coeur d'Alene and Colville and Camp Chelan are charged with the proper execution of this order.

By command of Brigadier-General Howard.

H. H. Pierce.
First Lieutenant, Twenty-First Infantry, Acting Aid-de-Camp"

10. On January 18, 1881, the President of the United States established the Spokane Reservation as follows:

"WASHINGTON TERRITORY

Spokane Reserve.

Executive Mansion, January 18, 1881

> It is hereby ordered that the following tract of land, situated in Washington Territory, be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely:
>
> Commencing at a point where Chemekane Creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of beginning.
>
> R. B. HAYES."

Thus the United States government, through President Hayes, carefully modified, clarified and enlarged the description of the Reservation to include additional land along the northern boundary and the beds of Chamokane Creek, and of the Spokane and Columbia Rivers. Such a designation, unique among executive

orders utilizing rivers as boundaries, was in partial response to the Tribe and its spokesmen that the Reservation should clearly include the waters of the rivers. From that date to this the United States government and its Congress has without deviation or change fully recognized the Spokane Reservation to be as described in the Executive Order of January 18, 1881.

11. While it was the intent of the United States that the Spokane Indians move to the newly established Reservation it became apparent that it had been established primarily an a result of pressure from the negotiations with the lower band of the Tribe lead by Chief Oliver Lot. In fact it came to be referred to as "Lot's Reservation." Few of the upper and middle bands moved to it and in fact many began to take up homesteads north of Spokane primarily in the Peone Prairie area. Others continued to reside,

farm and fish in the lands on and near the confluence of the Little Spokane River with the Spokane River and in the farming region north of the bend of Deep Creek near the Spokane River.

While the United States government had succeeded in the establishment of the Reservation, it had not succeeded in negotiating a treaty or agreement by which the title of the Indians to its aboriginal lands outside that Reservation would be ceded and extinguished. The City of Spokane Falls and all the homesteaded areas in the Big Bend, Peone and other areas were sitting on aboriginally owned unceded lands. It was, therefore, of great concern to the United States that such a cession be parleyed and take place.

12. In order to obtain the needed cession of aboriginal lands, the Congress in its Appropriation Act of May 15, 1886,

(Public No. 49, Page 17), appropriated moneys which were in part

> "To enable the Secretary of the Interior to negotiate with the upper and middle bands of Spokane Indians... for their removal to the Colville, Jocko and Coeur d'Alene Reservations with the consent of the Indians on said reservation(s) and also to enable said Secretary to negotiate with said Indians for the cession of their lands to the United States..."

The Secretary of the Interior then established a Commission headed by John V. Wright to perform the services contemplated by said Appropriations Act and to negotiate cession agreements with various Tribes including the Spokane Tribe.

13. The Wright Commission which met and parleyed with the upper and middle bands of the Tribe at Spokane Falls, Washington Territory, from March 7 to March 17, 1887, and on March 18, 1887, succeeded in securing what is denominated

the Agreement of March 18, 1887, with the Spokane Indians which agreement is set out in full in Volume 1, Kappler, Laws and Treaties, page 453, and was ratified by the Fifty-Second Congress, in 1892 (Session I, Ch. 164, 37 Stat 136, Kappler, Vol. 1, page 449).

By said Agreement, the Spokane Indians ceded to the United States "all right, title and claim which they now have, or ever had, to any and all lands lying outside of the Indian Reservations in Washington and Idaho Territories..." (Underlining Added).

The only reservation in the Tribal aboriginal lands being ceded was the Spokane Reservation established as aforesaid by Executive Order on January 18, 1881.

Thus there was a cession by the Spokanes of all of their lands outside of the Spokane Reservation and the lands on

that Reservation were carefully excluded from the cession. The Congress in ratifying the Agreement in 1892 ratified this cession of lands and the other provisions of the Agreement and in so doing also recognized as it did on other occasions the reservation of Tribal title to the Spokane Reservation.

14. On January 30, 1908, the United States government, through Special Agent Edgar A. Allen and others, held a final parley with the Spokane Indians at Fort Spokane, near Miles, Washington. The purpose of that parley was to get the consent of the Tribe to the opening of portions of the Reservation for homestead entry on what were descried as "surplus" agricultural lands. The fact that the parley took place and much of its proceedings were evidence of the conviction of the United States government that these lands were owned by the

Spokanes and consent of the Tribe was needed for them to be opened for homestead. The parley proceedings culminated in a memorandum of agreement between the Tribal chiefs and the government agencies which included the following paragraphs:

> "First. Consent is given to the opening for settlement of unallotted lands lying near Chemekane Creek and Spokane River, designated by the United States as suitable for farming purposes, the Indians to receive $5.00 per acre for such land, and
>
> "Second. To the turning over to the State sections 16 and 36 in each township of the Spokane Reservation for school purposes, the Tribe to be reimbursed for the same by the United States at the rate of $1.25 per acre.
>
> "Third. It is desired that all unallotted lands of the Reservation, not included in the two foregoing paragraphs of this memorandum be included in the United States Government Forest Reserve and cared for as such in the same manner as other such Forest Reserves."

15. By virtue of this parley and the aforesaid agreement there was enacted by

the United States Congress on May 29, 1908, (S. 6163) 35 Stat 458, "An Act to authorize the Secretary of the Interior to sell and dispose of the surplus unallotted agricultural lands of the Spokane Indian Reservation, Washington, and for other purposes." As a result of this Act and similar Acts for other Reservations, President William H. Taft on May 22, 1909, issued a Proclamation opening for homestead entry the Spokane and Flathead Reservations (that by virtue of the Flathead Act of April 23, 1905, 33 Stat L. 302), as well as the Coeur d'Alene Reservation (under its Homestead Act of 1906, 34 Stat L. 335), treating each Tribe and Reservation identically.

16. On March 3, 1905, the Congress enacted 33 Sat 1006, an act entitled "Chap. 1440 -- An Act providing for the acquirement of water rights in the Spokane River along the southern boundary of the

Spokane Indian Reservation for sites for power purposes and the beneficial use of said water, and for other purposes."

17. Further, in 1906 there was enacted in the annual Appropriations Act, 27 Stat 130, Vol. 1, 449, the following:

> "That the Secretary of the Interior be, and he is hereby, authorized in his discretion, to sell and convey by patent with such reservations as to flowage rights, dam sites, and mill sites appurtenant to water power, as he may prescribe, such tract or tracts of land of the Spokane Indian Reservation, State of Washington, lying at or near the junction of the Columbia and Spokane Rivers, not exceeding three hundred and sixty acres in extent, for townsite and terminal purposes, and that the money received therefrom shall be deposited in the Treasury of the United States to the credit of the Spokane Indians."

18. As outlined above, the Spokane Reservation, as established in 1881 by Executive Order, has been fully recognized, ratified and confirmed repeatedly by the Government of the United

States and especially by the Congress and in the other special acts and Homestead Act as outlined above.

19. Said Reservation lands, including the Spokane and Columbia Rivers and their beds bordering the Reservation, have, therefore, from time immemorial remained in the ownership of the Spokane Indians, never having been ceded by them or taken from them by any act of the United States government. These lands were carefully reserved for them by Presidential Decree in 1881 and as a part of the Reservation, the bed and banks of the rivers to the normal high water mark (before the dams were built) remain in the Spokane Indian Tribe.

20. The State of Washington claimed that it received title to said bed of the Spokane River at the time of statehood by reason of the operation of the "Equal Footing Doctrine" of the United States

Constitution. Such title, however, did not pass to the state to that section of the Spokane River by virtue of the Equal Footing Doctrine because it was held and owned by the Spokane Indian Tribe (with title then in trust for the Tribe in the United States). The United States, therefore, at the time of statehood, did not hold such title to the bed of the Spokane River on the Spokane Reservation as it did to the beds of other navigable bodies of water so as to pass it to the State of Washington on statehood. Rather that title already in the Spokane Tribe and held by the United States in trust for the Tribe was not affected by the so called Equal Footing Doctrine. Therefore, the State of Washington, has no title interest in the bed of the Spokane River within the Spokane Indian Reservation.

21. The Washington Water Power Company by virtue of an alleged

authorization by the Secretary of the Interior to build its Little Falls Dam in the southeast corner of the Reservation pursuant to the above-referenced Act of 1905, claims some interest in the bed of the river at that point and in the portion of the Spokane River under its reservoir behind Little Falls Dam. But said Act of 1905 did not authorize the grant of title to the Washington Water Power Company and no act by the Secretary of the Interior pursuant to that Act and application of the Washington Water Powert Company did or could grant any such title interest to said company.

22. The Washington Water Power Company built its Little Falls Dam at Little Falls in the southeast corner of the Reservation in 1908 and has operated that dam in the production of electric power in conjunction with its other dams on the Spokane River ever since 1908.

Except for a nominal payment to the Tribe at that time for some overflowed land on the north shore of the river it has never compensated the Tribe or paid it any damages or compensation whatsoever for its building of said dam on Tribal property and its operation of the same from 1908 to the present time. The Washington Water Power Company plans to continue its operation of said dam as its own property and without compensation to the Tribe for the indefinite future.

23. Prior to the building of said Little Dam by the Washington Water Power Company, the Spokane River bordering the Reservations was the gateway of the runs of salmon and other anadromous fish from the Pacific Ocean to the Spokane River and its tributaries. It constituted a primary fishery of the Spokane Tribe. Not only was Little Falls itself a prime fish gathering site but so was the lower part of

Chamokane Creek and the rest of the Spokane River and its tributaries up to Spokane Falls. This was the historic fishery of the Tribe on which it depended from ancient times, the fish harvest constituting its principal and most important food source. Salmon were key not only to the diet of Tribal members but to its culture and religion.

With the building of Little Falls by the Washington Water Power Company the anadromous fish runs up the Spokane River to the past Little Falls ceased and have not taken place since 1908, all to the irreparable loss and damage to the Tribe and its members.

The Washington Water Power Company could have reduced the fish loss if it had installed and operated as it initially planned a fish ladder so that the running fish could bypass the dam. Despite the fact that such a ladder was in the design

plans allegedly approved by the Secretary of the Interior, it was not installed or operated. Thus the Company did nothing to reduce or prevent the permanent and irrevocable loss of this valuable fishery.

WHEREFORE, the Spokane Tribe of Indians prays for Judgment as follows:

1. A Judgment declaring that the title of the bed of the Spokane River where it borders the south edge of the Spokane Indian Reservation up to the normal high water mark (existing before Little Falls and Grand Coulee Dams were built) is held by the United States in trust for the Spokane Indian Tribe.

2. A judgment declaring that the State of Washington does not hold title to or any title interest in or to said river bed.

3. A Judgment declaring that the Washington Water Power Company does not

hold title to or any title interest in or to the portion of the river bed occupied by its Little Falls Dam and the reservoir behind said dam within the Spokane Reservation.

4. A Judgment for damages and compensation to be paid to the Spokane Indian Tribe by the Washington Water Power Company for its wrongful and illegal building, maintenance and operation of the Little Falls Dam and power project on the Spokane Reservation since 1908 and for damages for the loss of the Tribal fishery caused by its building and maintenance of said dam. The amount of damages shall be determined at trial.

5. For such other and further relief as to the Court seems proper in the circumstances.

DATED: October 13, 1982.

DELLWO, RUDOLF & SCHROEDER, P.S.

By /s/
Robert D. Dellwo

By /s/
Gary T. Farrell

Attorneys for The Spokane Tribe of Indians

STATE OF WASHINGTON)
~~Stevens~~ :ss
County of Spokane)

JOHN W. SAMUELS, being first duly sworn on oath, deposes and says: That he is the Chairman of the Spokane Tribal Business Council, that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

/s/

Subscribed and sworn to before me this 6 day of October, 1982.

/s/
NOTARY PUBLIC in and for the State of Washington, residing at ~~Wellpinit~~ Spokane.

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Attorneys for Defendant
The Washington Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	Civil No. C-82-753-RJM
Plaintiff,	)	
vs.	)	SUPPLEMENTAL AND SECOND
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	AMENDED ANSWER OF THE WASHINGTON WATER POWER COMPANY AND COUNTER-CLAIM FOR DECLARATORY JUDGMENT
Defendants.	)	

Answering plaintiff's complaint, defendant The Washington Water Power Company (the "Company")

(a) admits that this Court has jurisdiction to litigate the claims of the Spokane Tribe of Indians as set forth in plaintiff's complaint,

(b) admits that on March 3, 1905, the Congress enacted 33 Stat. 1006, an Act entitled "Chapter 1440 - An Act providing for the acquirement of water rights in the Spokane River along the southern boundary of the Spokane Indian Reservation in the State of Washington, for the acquirement of lands on said reservation for sites for power purposes and the beneficial use of said water and or other purposes";

(c) admits that the Company, by virtue of ~~an~~ a grant and authorization by the Secretary

of the Interior, built its Little Falls Dam in the southeast corner of the Spokane Indian Reservation commencing in 1908 pursuant to the above-referenced Act of 1908 and has operated that dam for the production of electric power in conjunction with its other dams on the Spokane River since 1910 and admits that it paid compensation to the Tribe as directed by the United States Government pursuant to the Act of 1905 and that the Company plans to continue its operation of said dam for the indefinite future without further compensation to the Tribe;

(d) denies that the building of Little Falls Dam by the Company interrupted the anadromous fish

runs up the Spokane River at its Little-Falls Dam, denies that the Company did not install and operate a fish ladder for the bypassing of said dam and denies that the Company did nothing to reduce or prevent the permanent and irrevocable loss of fishery on the Spokane River;

(e) for lack of any knowledge or information sufficient to form a present belief as to the truth of the remaining allegations of the complaint, defendant, the Company,

denies the same.

II.

FOR FURTHER ANSWER AND AS AN AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges that plaintiff's complaint fails to allege

a cause of action for which relief can be granted.

III.

FOR FURTHER ANSWER AND AS A SECOND AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges:

(a) that pursuant to the Act of March 3, 1905, referred to in plaintiff's complaint and pursuant to ~~permits~~ property and rights granted by the Secretary of the Interior under the provisions of said Act, the Company was granted by the United States the land and full authority to construct, operate and maintain the Little Falls Dam;

(b) that pursuant to said Act and the regulations of the Department of the Interior the-

Company paid to the United States on behalf of the Spokane Indians an amount of money then determined by the United States to be the proper compensation to the Indians for the then value of any Indian reservation properties affected by the dam;

(c) that the company did construct a fish ladder and to the best of its present knowledge and belief it was in operation so long as it was useful on the Spokane River;

(d) that in the 1930's the federal government constructed the Grand Coulee Dam which effectively blocked any further runs of anadromous fish on the Columbia River and its tributaries, including the Spokane River, above the Grand Coulee Dam.

IV.

FOR FURTHER ANSWER AND AS A THIRD AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges:

That the right of action set forth in the Complaint as against the Company accrued more than seventy-four (74) years prior to the commencement of this action, and said right of action is barred by a statute of litigation or laches.

FOR FURTHER ANSWER AND AS A FOURTH AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges:

On December 31, 1941, in an action in this Court, United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D.Wa. 1941), judgment was rendered against the United States where it was determined that the right, title, and authority granted by the United States pursuant to the Act of

March 3, 1905, authorized the construction and operation of hydroelectric facilities along the Spokane River on the south boundary of the Spokane Indian Reservation. At all times relevant, therein, the United States was guardian and trustee for the Spokane Tribe of Indians. By reason of said action, plaintiff's claim against TWWPCo in this action has been previously litigated, adjudicated, and determined by plaintiff's guardian and trustee. Therefore, plaintiff is barred from relitigating this issue by reason of collateral estoppel.

VI.

FOR FURTHER ANSWER AND AS A FIFTH AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges:

Prior to this action, the United States conveyed to TWWPCo all the right, title and interest to real property

pursuant to the Act of March 3, 1905, required to construct, operate and maintain the Little Falls Development. The title granted by the United States is fee title with no reverter. Plaintiff's Complaint constitutes either a direct or collateral attack upon TWWPCo's right, title and interest, which said attack is barred by reason that the United States at all times relevant hereto was acting as guardian and trustee for the plaintiff.

VII.

FOR FURTHER ANSWER AND AS A SIXTH AFFIRMATIVE DEFENSE TO PLAINTIFF'S COMPLAINT, defendant, the Company, alleges:

Under the Act of August 13, 1946, 60 Stat. 1049, hereinafter referred to as the "Indian Claims Commission Act," the Tribe had the right to assert any claim for compensation arising out of the Act of March, 1905, including the construction,

operation and maintenance of the Little Falls development, and arising out of the acquisition of the beds of the Spokane River below the ordinary high water mark, if any, by the State of Washington under the Constitution and laws of the United States. The Tribe either made a claim under the Indian Claims Commission Act and was duly compensated with respect to any rights it may have had which were affected by the construction and operation of the Little Falls Development and the acquisition, if any, by the State of Washington of the beds of the Spokane River, or the Tribe abandoned, relinquished, waived, and lost, under the Indian Claims Commission Act, any such claim that it may have had. Any claim of the Tribe against the United States with respect to the construction, operation, and maintenance of the Little Falls Development and the ownership of the bed

of the Spokane River is barred by the Indian Claims Commission Act and the actions of the Tribe.

The Company acquired its rights, title and interests from the United States under the Act of March 3, 1905, and, to the extent required, from the State of Washington. The State of Washington acquired its interest, if any, to the beds of the Spokane River from the United States. The right, title and interests acquired by the Company and the State of Washington from the United States that relate to the construction, operation and maintenance of the Little Falls Development are protected by and benefit from the effect and the bar of the Indian Claims Commission Act from the claims now made by the Tribe.

VIII.

FOR FURTHER ANSWER AND AS A SEVENTH AFFIRMATIVE DEFENSE TO PLAINTIFF'S

COMPLAINT, defendant, the Company, alleges:

The Spokane Tribe of Indians and the Secretary of the Interior, on behalf of the Spokane Tribe of Indians, elected to present to the Federal Power Commission ("FPC") (later, to the Federal Energy Regulatory Commission ("FERC")) the issues concerning the rights, title and interests of the Company to construct, operate and maintain the Little Falls Development on the Spokane River. The Spokane Tribe of Indians was duly represented before the FPC and FERC by Robert D. Dellwo, as its attorneys, as well as by the Secretary of the Interior through Charles E. O'Connell, an attorney with the Solicitor's Office of the Justice Department. All of the evidence deemed relevant at the time by the Spokane Tribe of Indians and the Secretary of the Interior with respect to the rights, title and interests of the

Company to construct, operate and maintain the Little Falls Development on the Spokane River was presented at evidentiary hearings held by the FERC. Various decisions were issued by the FERC after such hearings. The matter was finally adjudicated in Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985), wherein the Court determined that:

> The Washington Water Power Company by appropriation acquired the water rights and the lawful right of way for the construction of a dam to divert, store and beneficially use the subject waters of the Spokane River and now owns the rights, title, interest, authority and right of way necessary for the construction, operation and maintenance of the Little Falls Power Development ... .

Id. at 336. Based on the foregoing, the Spokane Tribe of Indians is barred by the doctrines of collateral estoppel and res judicata from litigating, in this case,

the rights, title and interests of the Company with respect to the construction, operation, and maintenance of the Little Falls Development.

IX.

FOR COUNTERCLAIM AGAINST PLAINTIFF, defendant, The Washington Water Power Company (the "Company") alleges:

(a) On or about January 18, 1881, President Hayes created the Spokane Indian Reservation by Executive Order. The Spokane Indian Reservation was not created either by a treaty approved by the United States Senate or by Act of Congress.

(b) The United States Congress, by Act dated March 3, 1905 (33 Stat. 1006), authorized the acquisition with the consent of the Secretary of the Interior of the right to use the waters of

the Spokane River and authorized the Secretary of Interior to grant lands "necessary and requisite for overflow rights and for the erection of suitable water, electrical or power plants, dams, wingwalls, flumes or other needful structures required for the development of power or for the beneficial use of said water" along the Spokane River on the south boundary of the Spokane Indian Reservation to appropriators under and pursuant to the laws of the State of Washington.

(c) In 1905 a David Wilson commenced the acquisition of water rights under Washington law and applied for a grant from the Secretary of Interior for the right to use the waters of the Spokane River

and declare the lands necessary to develop the water power under the Act of March 3, 1905. On or about January 24, 1906, Mr. Wilson filed an amended application which was subsequently approved by the Secretary of Interior on or about May 4, 1906. In September, 1906, Mr. Wilson filed an amended application which was approved by the Secretary of Interior on or about November 3, 1906.

(d) The rights of David Wilson in the Little Falls power site were conveyed to the Company, which was approved by the Secretary of Interior.

(e) Subsequently, the Company applied for additional land and water rights under the Act of 1905 which application was

approved on or about August 29, 1908.

(f) In January, 1909, a joint resurvey by the Department of the Interior and the Company of the Wilson grant was completed and the Company applied for an amended grant to conform to the joint resurvey on July 6, 1909. Such joint resurvey was approved and the amended grant to the Company was approved by the Secretary of Interior in 1910, at which time the Company had complied with all requirements of the Act of 1905 and the requirements of the Secretary of Interior.

(g) At or prior to this time the Company completed all action necessary to acquire by appropriation under Washington law

the right to use the waters of the Spokane River for hydro-electric generation purposes up to the capacity of the turbines installed in the dam, i.e., 7500 cfs.

(h) In order to secure a recordable grant, the Company applied to the Secretary of Interior for a patent or instrument in the nature of a patent and after hearing and rehearing the Secretary of Interior delivered to the Company an instrument reciting the facts relating to the grant and acknowledging that the Company had made full payment for the lands granted and had complied with all rules and regulations promulgated by the Secretary of Interior, which instrument was recorded in

Stevens County, Washington. A copy of said instrument is attached hereto and is by this reference made a part hereof as though set out in full.

(i) That as of 1910 upon the approval by the Secretary of Interior of the resurvey and additional grant, the Company received from the United States under the Act of 1905 a fee title, subject to an implied condition of reverter, to the land which, together with water rights acquired pursuant to the laws of the State of Washington and the permission of the United States as set forth in the Act of March 3, 1905, granted to the Company the right to dam the river in order to use the waters of the Spokane River for the

generation of electric power, which fee title would revert to the United States only upon the Company discontinuing the use of the land and the water for production of electric power.

WHEREFORE, having fully answered plaintiff's complaint defendant, The Washington Water Power Company, prays for relief as follows:

1. For an order dismissing, with prejudice, plaintiff's complaint against defendant, The Washington Water Power Company;

2. For an order determining that The Washington Water Power Company holds and owns, in fee, all rights, title and interests necessary for the construction, operation and maintenance of a hydro-electric power project of the nature and scope of the Company's Little Falls Development on the Spokane River;

3. In the alternative to prayer for relief No. 2, for an order determining that at least since 1910 defendant The Washington Water Power Company has had full right and authority to construct and operate its Little Falls Development and to utilize the waters of the Spokane River for hydroelectric generation of electricity up to the maximum capacity of the turbines installed in the dam, i.e., 7500 cfs; such use and occupancy being subject only to an implied condition of reverter of the fee title to the lands occupied, in the event the Company should discontinue the use of the land and water for the production of electric power as specified in the Act of March 3, 1905; and

4. For reasonable costs and attorneys' fees incurred herein along with such other and further relief as the Court may deem just and proper.

DATED this 24th day of October, 19 89.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By _____
Jerry K. Boyd
Attorneys for Defendant,
The Washington Water Power Company

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Attorneys for The Washington
Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	MOTION FOR SUMMARY
v.	)	JUDGMENT OF DISMISSAL
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	OF THE CLAIMS OF THE TRIBE
Defendant.	)	BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, AND LACHES

COMES NOW The Washington Water Power Company (WWP), by and through its

undersigned attorneys, and moves the Court for its judgment dismissing the claims of The Spokane Tribe of Indians (Tribe) against WWP on the basis that such claims are barred by the Indian Claims Commission Act (25 U.S.C.S. §70(u) (1983), the act prohibiting the U.S. from attaching its patents (43 U.S.C. §1166), the Doctrine of Res Judicata, the Doctrine of Collateral Estoppel, the Doctrine of Estoppel by Deed, and the Doctrine of Laches). The factual bases for this Motion are contained in the Affidavit of Donald L. Olson and the documents attached to WWP's Requests for Admission submitted to the Tribe and the admissible documents attached to the Affidavit of Robert D. Dellwo, and the Affidavits of Jerry K. Boyd. A Memorandum of Authorities is filed in support of this motion.

WWP moves this Honorable Court for its order dismissing the claims of the Spokane Tribe of Indians against WWP with prejudice.

DATED this 6th day of October, 1989.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By_____
Jerry K. Boyd
Attorneys for WWP
WSBA #2099

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Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	AFFIDAVIT OF JERRY K. BOYD
v.	)	
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	
Defendant.	)	

STATE OF WASHINGTON)
) ss.
County of Spokane)

JERRY K. BOYD, being first duly sworn, on oath, deposes and says:

He is one of the lawyers in the above-entitled matter and states the following based on his personal knowledge.

1. He was one of the lawyers for The Washington Water Power Company before the Federal Energy Regulatory Commission and the United States Court of Appeals for the District of Columbia which decided Washington Water Power Company v. Federal Energy Regulatory Commission, 775 Fed. 2d. 305 D.C. Cir. (1985).

2. Attached is a copy of Senate Report No. 4378 for the 58th Congress, 3d Session, which is dated March 1, 1905, which was obtained from the Library of Congress.

3. Attached is a copy of House Executive Document No. 63 for the 50th Congress, 1st Session which was obtained from the Library of Congress. The date on House Executive Document No. 63 is January 9, 1888.

4. Attached is a "Report on Navigability of Spokane River, Washington, and Idaho" made by the Chief of Engineers, U. S. Army, Washington, D.C. which report is dated April 29, 1932. The copy which is attached is certified by Robert R. Spearman and was provided to this affiant by Mr. Spearman. Mr. Spearman was identified to this affiant as the spokesperson for the Corps of Engineers for the Seattle District.

5. Attached is a copy of pages from Indian Affairs, Laws and Treaties, Volume 1 Compiled to December 1, 1902. The front page of the volume and the pages were copied from a volume published by the government printing office which this affiant personally obtained from the government printing office. The Volume includes a copy of the Allotment Act of 1887 (pages 33-36), and a copy of the Act of March 2, 1899 relating to right-of-way

for railway (pages 102-104), a copy of Section 16 of the Act of 1891 which includes a copy of the Agreement with the Coeur d'Alene Indians which includes Article 3 relating to the Upper and Middle Bands of the Spokane Indians (pages 419 through 424, particularly page 420), the Act of 1892 which authorizes the funding for the movement of the Upper and Middle Bands of the Spokane Indians, Coeur d'Alene Indian Reservation and a copy of the 1887 Agreement with the Spokane Indians (pages 49, 53-54), a part of an Act which further provides for the removal of the Spokane Indians under the 1887 Agreement (page 742), a part of the Act which provides for entry of mineral lands on the Spokane Indian Reservation (page 754 and 799), copies of the Executive Orders dated April 8, 1872, April 9, 1872, and July 2, 1872, relating to the Colville Reserve established for Indians, including

the Spokane Indians (pages 915 and 916), and documents relating to the Executive Order dated January 18, 1881, establishing the Spokane Indian Reservation (pages 924-925.

6. Attached is a copy of portions of Senate Document No. 719 for the 62nd Congress, 2d Session, entitled "Indian Affairs, Laws and Treaties, Volume III, compiled to December 1, 1913, which were compiled by Charles J. Kappler. The document was obtained by this affiant from the United States Government Printing Office. The attached document includes pages from said Volume III, including a statement relating to the 1887 Agreement with the Spokane Indians (page 46), the Act of March 3, 1905, providing for the acquisition of power sites, (pages 116 and 117), a portion of the Act of 1906 relating to the Spokane Indians and providing for the sale and conveyance by

patent of flowage rights and dams on the Spokane Indian Reservation (page 245), copies of portions of a 1908 Act which provides for the surveying and allotment of the Spokane Indian Reservation (pages 313-314), an Act of May 29, 1908, authorizing the Secretary of the Interior to make allotments and to open for settlement by non indians on allotted surplus agricultural land (pages 371-373), a portion of an Act of 1909 providing for the survey, allotment and the opening of the Spokane Indian Reservation (pages 420-421), and the Proclamation opening the Spokane Indian Reservation for settlement (pages 655-657).

_____

JERRY K. BOYD

SUBSCRIBED AND SWORN to before me this 3rd day of October, 1989.

_____

NOTARY PUBLIC in and for the State of Washington, residing at Spokane.
My Commission Expires:_____

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Attorneys for The Washington Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS, Plaintiff, v. STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY, Defendant.	No. C-82-753-AAM AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 6, 1989

STATE OF WASHINGTON)
:ss.
County of Spokane)

JERRY K. BOYD, being first duly sworn, on oath deposes and says:

He is one of the attorneys in the above-entitled matter and was an attorney

for the Washington Water Power Company in the proceedings before the Federal Power Commission and Federal Energy Regulatory Commission which ultimately resulted in the decision in Washington Water Power Co. v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985). The below-stated facts are stated from his personal knowledge and from the pleading records retained by the offices of this affiant relating to the foregoing matter. The below-stated facts are also based upon documents provided by the attorneys for The Spokane Tribe of Indians in this matter before this Court. The Washington Water Power Company will be referred to as "WWP" and The Spokane Tribe of Indians will be referred to "Tribe."

1. On or about February 5, 1971, The Spokane Tribe of Indians served and filed a Petition to Intervene before the Federal Power Commission in Docket

No. IT-5501 and Project No. 2545 concerning the Little Falls Dam. A copy of said Petition is attached hereto and is by this reference made a part hereof as though set out in full.

2. On or about February 15, 1973, the Secretary of the Interior intervened before the Federal Power Commission in Project No. 2545 and Docket No. IT-5501 on behalf of The Spokane Tribe of Indians. A copy of the Petition to Intervene filed on behalf of the Secretary of Interior is attached hereto and is by this reference made a part hereof as though set out in full.

3. On and before October 4, 1977, WWP contended that the Federal Power Commission and the Federal Energy Regulatory Commission (FERC) did not have jurisdiction to consider the matters raised by the Tribe. Arguments were had before an Administrative Law Judge. Both

the Secretary of Interior on behalf of The Spokane Tribe of Indians and The Spokane Tribe of Indians, by and through its attorney, Robert D. Dellwo, argued that the FERC had jurisdiction to determine WWP's rights with respect to the Little Falls Hydroelectric Development. Ultimately, the Administrative Law Judge determined that the FERC did have such jurisdiction and the matter proceeded.

4. The staff of the FERC, the Secretary of the Interior, the Spokane Tribe of Indians, and WWP presented all evidence to the FERC which the respective parties deemed relevant to the determination of WWP's rights, title and interest in the Little Falls Hydroelectric Development. Hearings were held and the parties filed legal briefs and made all arguments the parties deemed relevant. An Administrative Law Judge and the FERC issued various orders making findings and

conclusions relating to WWP's rights with respect to the Little Falls Hydroelectric Development. All of the relevant and admissible documents relating to WWP's rights, title, and interest which have been submitted to this Court were submitted to and considered by the FERC. Those documents included all of the governmental documents identified and submitted to this Court. Evidentiary hearings were held by the FERC in Spokane, Washington, and in Washington, D.C. at which time the Secretary of the Interior on behalf of the Spokane Tribe of Indians and the Spokane Tribe of Indians through its attorney, Robert Dellwo, had an opportunity to present whatever testimony and offer whatever documents they deemed relevant and material to the determination of the rights, title and interest of WWP in the Little Falls Hydroelectric Development. In addition, the staff of the

FERC presented evidence concerning the issue of WWP's rights to Little Falls. The issue before the FERC was whether or not WWP had acquired all of the right, title and interest prior to June 10, 1920 (the effective date of the Federal Water Power Act) necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. The Spokane Tribe of Indians, the Secretary of the Interior, and the staff of the FERC were all attempting to establish that WWP did not have all of the rights, title and interest for the construction, operation, and maintenance of the Little Falls Hydroelectric Development.

After the hearings were closed, and after the parties had submitted all of the testimony and documentary evidence which they deemed relevant, the Spokane Tribe of Indians requested an opportunity to reopen the hearings to present additional

documentary evidence. WWP opposed such request by the Tribe. The hearing officer reopened the hearings and allowed additional evidence to be presented by Tribe.

Briefs on legal issues were filed by all parties. All parties had an opportunity to make all of the legal arguments based on record before the FERC. Some of the findings and conclusions made by the FERC were adverse to WWP.

5. The Spokane Tribe of Indians, through its attorney, Robert D. Dellwo, the Secretary of the Interior through its solicitor, and the staff of the FERC had a full and fair hearing before the FERC.

6. WWP filed a Petition for Judicial Review with the United States Court of Appeals for the D.C. Circuit. All of the documents filed with the FERC were submitted to the United States Court of Appeals. The United States Court of

Appeals considered the entire record before the FERC and determined, as a matter of law, that WWP holds all rights, title, and interest necessary for the construction, operation, and maintenance of the Little Falls Hydroelectric Development. Washington Water Power Co. v. FERC, 775 F.2d 305, 336 (D.C. Cir. 1985).

7. A copy of WWP's Petition for Judicial Review was served upon all parties including the FERC, the attorney representing the Secretary of the Interior, and the attorney representing the Spokane Tribe of Indians. The Spokane Tribe of Indians intervened as a party in Washington Water Power Co. v. FERC, 775 Fed.2d 305 (D.C. Cir. 1985). The FERC was represented by an attorney. The position taken by the FERC's attorney and the attorney for the Spokane Tribe of Indians was substantially the same. Both parties filed briefs before the United States

Court of Appeals, D.C. Circuit, and both parties made oral argument before the United States Court of Appeals. As is shown by the decision of the United States Court of Appeals in Washington Water Power Co. v. FERC, the issue before the court was whether or not WWP had acquired, prior to June 10, 1920, all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Development. If WWP had not acquired such rights, title and interest prior to 1920, then, under the Federal Power Act, WWP may have been required to obtain a license to continue to operate and maintain the Little Falls Hydroelectric Development.

8. At all times relevant to the proceedings before the FERC, the United States Court of Appeals and the United States Court of Appeals, D.C. Circuit, the Spokane Tribe was vigorously represented

by Robert D. Dellwo and his law firm. The Spokane Tribe of Indians and their representatives had a full and fair hearing and an opportunity to present whatever evidence the Tribe and their attorneys deemed relevant and material. The Tribe had an opportunity to make whatever legal arguments they deemed relevant and material.

9. The Spokane Tribe of Indians filed a claim against the United States for compensation in Indian Claims Commission No. 331. A copy of the Petition is attached hereto and is by this reference made a part hereof as though set out in full. This copy was obtained from the attorneys for the Tribe in this matter before this Court.

10. This affiant has been representing the Washington Water Power Company with respect to this matter since approximately 1972. This affiant has been

unable to find any living Washington Water Power Company who has any personal knowledge concerning the construction and operation of the Little Falls Hydroelectric Development prior to 1920.

11. The record that was presented to the United States Court of Appeals in Washington Water Power Co. v. FERC, included a transcript of all of the hearings and testimony presented to the FERC and included all of the documentary evidence presented to the FERC and included most of the documentary filing (pleadings, etc.) which were submitted to the FERC. The documentary evidence in the record included more than 150 documents which were admitted in the hearings and which were offered by various parties, including the Tribe.

JERRY K. BOYD

SIGNED AND SWORN TO before me this 5th day of October, 1989, by JERRY K. BOYD.

_____

Notary Public in and for the State of Washington, residing at Spokane.
My Appointment Expires: _____

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Attorneys for The Washington Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 19, 1989
v.	)	
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	
Defendants.	)	

STATE OF WASHINGTON)
) ss:
County of Spokane)

JERRY K. BOYD, being first duly sworn, on oath deposes and says:

He is one of the attorneys for The Washington Water Power Company in this

matter and represents The Washington Water Power Company in The Washington Water Power Company v. Spokane Tribe of Indians, Cause No. C-85-705-RJM, before the United States District Court, Eastern District of Washington. He was also one of the attorneys for The Washington Water Power Company in The Washington Water Power Company v. FERC, 775 2d. 305 (1985). The below stated facts are based upon his personal knowledge and information.

1. The Tribe has claimed that it has the power to impose a tax on The Washington Water Power Company (WWP) with respect to the operation of the Little Falls Hydroelectric Development. The subject matter of such tax and the authority of the Tribe to impose such tax is at issue in said Cause No. C-85-705-RJB.

2. Exhibit No. 77 before the Federal Energy Regulatory Commission (FERC) was a

certified copy of the patent issued by the United States Secretary of the Interior, Mr. Hubert Work, in 1924. A true and correct and complete copy of such patent as recorded in the auditor's office for Stevens County, State of Washington, is attached hereto.

_____

JERRY K. BOYD

SUBSCRIBED AND SWORN to before me this 19th day of October, 1989.

_____

NOTARY PUBLIC in and for the State of Washington, residing at Spokane.
My commission expires:_____

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Attorneys for The Defendant, The
Washington Water Power Company

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS, Plaintiff, v. STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY, Defendants.	No. C-82-753-AAM AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 25, 1989

STATE OF WASHINGTON)
:ss.
County of Spokane)

JERRY K. BOYD, being first duly sworn, on oath deposes and says:

1. The below-stated facts are based upon his personal knowledge and informa-

tion and are based upon the documents in his files arising from the proceedings which lead to the Court's opinion in Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985).

2. Attached hereto and by this reference made a part hereof is a copy of defendant The Washington Water Power Company's First Requests for Admission to Plaintiff. Said Requests for Admission to plaintiff were served on September 12, 1989. Neither the Spokane Tribe of Indians nor the Tribe's attorneys have served any response whatever to said Requests for Admission. The facts stated in said Requests are by this reference made a part hereof as though set out in full.

3. This affiant and Robert D. Dellwo represented The Washington Water Power Company and the Spokane Tribe of Indians, respectively, in proceedings

before the Federal Energy Regulatory Commission (FERC) and the United States Court of Appeals for the District of Columbia.

4. On March 22, 1978, the presiding Administrative Law Judge of the FERC issued an Order to all parties in the proceedings with respect to Project No. 2545, which parties included the FERC staff, the Secretary of the Interior, the Spokane Tribe of Indians, and The Washington Water Power Company (WWP). A copy of the Order of the presiding Administrative Law Judge dated March 22, 1978 is by this reference made a part hereof as though set out in full.

5. By Order of March 22, 1978, the presiding Administrative Law Judge ordered all parties to the FERC proceeding to file memoranda with respect to the issue of whether or not FERC had jurisdiction to determine the rights of WWP with respect

to the Little Falls project. Attached hereto and incorporated by this reference hereof is a copy of the memoranda filed by the Secretary of the Interior, WWP, the Spokane Tribe of Indians, and the FERC staff. Said copies are true and correct copies of the briefs or memoranda submitted by the parties.

6. Following the submission of briefs and memoranda by the parties to the FERC proceeding, the presiding Administrative Law Judge issued an Order dated June 1, 1978, by which the Administrative Law Judge ordered further proceedings and concluded that the FERC had authority and jurisdiction to determine the rights of WWP with respect to the Little Falls Hydroelectric Development. The Administrative Law Judge based his conclusion on Section 23A and Section 23B of the Federal Power Act (16 U.S.C. §§ 816 and 817). The Administrative

Law Judge then ordered further proceedings, which included several hearings where all parties fully participated, including WWP and the Tribe, and where more than 150 exhibits were admitted. All of the exhibits identified and admitted in the FERC proceeding have been identified as exhibits by the parties herein.

7. On April 1, 1980, the presiding Administrative Law Judge issued his initial decision determining commission jurisdiction over the Little Falls Hydroelectric Development and also certified a record accompanying the initial decision. Copies of the initial decision of the presiding Administrative Law Judge and the record are attached hereto and are by this reference made a part hereof as though set out in full.

8. On March 26, 1979, the presiding Administrative Law Judge issued an Order

setting hearing dates for Spokane, Washington, and Washington, D.C. A copy of said Order is attached hereto and is by this reference made a part hereof as though set out in full.

9. After hearings were held in Spokane, Washington, and in Washington, D.C., the parties then submitted briefs. A copy of the Brief of the Spokane Tribe filed with the FERC dated September 17, 1979, the initial Brief submitted by WWP to FERC for Project No. 2545 served on September 4, 1979, the initial Brief dated September 24, 1979 filed by the Commission staff counsel with the FERC in Project No. 2545, and the initial Brief filed by the Secretary of the Interior dated September 24, 1979, filed with the FERC in docket number 2545 are attached hereto and are by this reference made a part hereof as though set out in full. As the Briefs show, the same issues raised in this

proceeding before this Court were presented to the Administrative Law Judge in the FERC proceeding as it relates to the rights, title and interest of WWP with respect to the Little Falls Hydroelectric Development.

10. After the issuance of the initial decision on April 1, 1980 by the presiding Administrative Law Judge, WWP filed its Brief on Exceptions to the Initial Decision. A copy of WWP's Brief on Exceptions is attached hereto and is by this reference made a part hereof as though set out in full.

11. The Tribe, the Secretary of the Interior, and the FERC staff all filed briefs opposing WWP's exceptions and supporting the ALF's initial decision.

12. On April 8, 1981, the FERC issued its Opinion No. 117, whereby the FERC concluded that WWP did not have all of the rights, title and interests

necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. A copy of FERC Opinion No. 117 is attached hereto and is by this reference made a part hereof as though set out in full.

13. On or about October 4, 1983, the FERC issued its Opinion No. 117-A and denied WWP's Motion for Rehearing. It is the FERC Opinion No. 117 and Opinion No. 117-A from which WWP sought judicial review by the United States Court of Appeals in the District of Columbia.

14. All or substantially all of the transcript of hearings and the exhibits which were submitted to the FERC were also submitted to the United States Court of Appeals for the District of Columbia.

15. The Spokane Tribe of Indians fully participated in all aspects of the proceedings before the FERC and fully participated in the proceedings before the

United States Court of Appeals for the District of Columbia prior to the issuance by the United States Court of Appeals of its Opinion in WWP v. FERC, 775 F.2d 305 (D.C. Cir. 1985).

16. The issue of the rights, title and interest obtained by WWP under the Act of March 3, 1905 and under Washington law were fully adjudicated before the FERC and were fully presented and fully argued before the United States Court of Appeals for the District of Columbia in the matter described above. All parties, including the Tribe, had a full opportunity to present whatever evidence the Tribe deemed relevant to the issue of the rights, title and interest of WWP with respect to the Little Falls Hydroelectric Development. In the matter before the FERC, it was WWP's burden of proof to show that WWP had all of the rights, title and interest necessary for the construction, operation

and maintenance of the Little Falls Hydroelectric Development and that WWP had acquired such rights prior to June 10, 1920. That was the issue that was presented to the FERC and that was the issue the FERC and the United States Court of Appeals for the District of Columbia adjudicated.

17. The proceedings before the FERC and before the United States Court of Appeals for the District of Columbia required this affiant and other attorneys in this affiant's law firm to spend hundreds of hours in preparing for such hearings and in preparing briefs and in making arguments before the FERC and before the United States Court of Appeals. This legal work was performed at great cost to WWP. If the same issues must be tried and presented to this United States District Court, all of the efforts made before the FERC and made before the United

States Court of Appeals will have been wasted since such efforts and the outcome of such litigation, which was initiated by the actions and the intervention of the Spokane Tribe of Indians before the Federal Power Commission and the FERC, and was pursued and prosecuted to a final conclusion by the FERC and the Tribe. To the personal knowledge of this affiant, the Spokane Tribe of Indians has had a full opportunity to litigate the issues with respect to the rights, title and interests acquired by WWP and held by WWP with respect to the Little Falls Hydroelectric Development before the FERC and the United States Court of Appeals for the District of Columbia.

18. Attached hereto and by this reference made a part hereof are the Briefs filed by the Secretary of the Interior and the Spokane Tribe of Indians with the United States Court of Appeals

for the District of Columbia, Docket No. 83-2051, which is the case that ultimately resulted in the opinion in Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985).

19. Attached hereto and by this reference made a part hereof is a true and correct copy of the decision issued by the United States Court of Appeals in Docket No. 83-2051 in The Washington Water Power Company v. Federal Energy Regulatory Commission, which decision is published at 775 F.2d 305. Attached to the opinion is a copy of the orders of the United States Court of Appeals for the District of Columbia wherein the Court denied the Petition for Rehearing filed by the FERC and the Tribe and rejected the suggestion for rehearing en banc. The copies of such decision and orders attached hereto are true and correct copies of the copies

received by the undersigned attorney from the Court.

_____
JERRY K. BOYD

SUBSCRIBED AND SWORN TO before me this 26th day of October, 1989, by Jerry K. Boyd.

_____
Notary Public in and for the State of Washington, residing at Spokane.
My commission expires:_____

No. 91-35000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPOKANE TRIBE OF INDIANS,
Plaintiff/Appellant,
vs.
STATE OF WASHINGTON,
Defendant,
and
WASHINGTON WATER POWER COMPANY,
Defendant/Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
NO. CV-82-00753 AAM

BRIEF OF APPELLEE WASHINGTON WATER POWER COMPANY

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TABLE OF CONTENTS

Page(s)

I. STATEMENT OF ISSUES ON APPEAL 163a

II. STATEMENT OF FACTS 164a

A. PROCEDURAL HISTORY. . . 165a
B. COURT PROCEEDINGS 184a
C. FACTS RELATED TO TRIBE'S MOTION 190a

III. ARGUMENT 193a

A. THE TRIBE IS COLLATERALLY ESTOPPED FROM RE-LITIGATING OWNERSHIP INTERESTS AT THE LITTLE FALLS SITE 193a

B. ALL OF THE ELEMENTS TO APPLICATION OF COLLATERAL ESTOPPEL, AS SET FORTH BY THE TRIBE, HAVE BEEN MET 200a

1. Identity of issues . 202a
2. Actual decision in D.C. Circuit case . 204a
3. Issues necessarily decided 207a
4. Full and fair opportunity for hearing 208a

C. THE TRIBE'S DAMAGES CLAIMS ARE BARRED BY *RES JUDICATA*, AND THE DOCTRINE AGAINST COLLATERAL ATTACK 210a

1. Exclusive compensation method 211a
2. *Res judicata* effect of Indian Claims Commission Act . . . 213a
3. Collateral attack on patent 215a
4. Laches bars the Tribe's damages claims 217a
5. WWP is in the position of a bona fide purchaser 219a

D. THIS COURT HAS APPELLATE JURISDICTION ONLY OVER THE TRIBE'S MOTION WHICH WAS DISMISSED, AND SHOULD NOT DECIDE ISSUES NEVER DECIDED BELOW 222a

E. THE TRIBE'S MOTION LACKED MERIT BELOW, AND SHOULD BE DENIED HERE 225a

IV. CONCLUSION 258a

APPENDICES

A. Cover page and Statement of Issues presented in appellant Spokane Tribe of Indians brief to District of Columbia Circuit Court of Appeals . . . . . [A-1]

B. Notice of Appeal by WWP (companion appeal) . . . . . [B-1]

* * *

TABLE OF AUTHORITIES

Page(s)

Cases:

United States Supreme Court Cases:

Blum v. Bacon, 457 U.S. 132 (1982) 173a

Blum v. Stenson, 465 U.S. 886 (1984) 212a

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. ___, 106 L.Ed.2d 343 (1989) . . . 257a

Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970) 248a

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 194a,197a-199a, ... 201a

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 243a

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) 240a

Mattz v. Arnett, 412 U.S. 481 (1973) 250a

Nevada v. United States, 103 S.Ct. 2906 (1983) 214a

Menominee Tribe v. United States,
391 U.S. 404 (1968) 247a

Montana v. United States,
440 U.S. 147, 153 (1979) . . . 193a,
. . . . . 201a-203a, 253a,257a

Puyallup Tribe v. Department of Game of Washington,
391 U.S. 392 (1968) 245a

Rosebud Sioux Tribe v. Kneip,
430 U.S. 584 (1977) 228a, 229a, 239a
. . . . . 244a

Shaw v. Kellogg,
170 U.S. 312, 342 (1898) . . . 216a

Shoshone Tribe v. United States,
299 U.S. 476 (1937) . . 234a, 236a

Singleton v. Wulff,
428 U.S. 106 (1976) 225a

Sioux Tribe of Indians v. United States,
316 U.S. 317, 326 (1942) . . . 216a,
. . . . . 227a-228a, 252a, 254a

Solem v. Bartlett,
465 U.S. 463 (1984) 237a

Southern Pacific R.Co. v. United States,
168 U.S. 1 (1897) 193a

United States v. Winans,
198 U.S. 371 (1905) 245a

University of Tennessee v. Elliott,
478 U.S. 788 (1986) . . 196a, 199a

Washington v. Fishing Vessel Ass'n,
443 U.S. 468 (1979) 244a

Other Federal Decisions:

A&A Concrete v. White Mountain Apache Tribe,
781 F.2d 1411
(9th Cir. 1986) 210a

Armco, Inc. v. Armco Burglar Alarm Co.,
693 F.2d 1155 (5th Cir. 1982) 218a

Big Bend Transit Co. v. United States,
42 F.Supp. 459,
463-466 (E.D.Wash. 1941) 172a, 216a
. . . . . 220a

Boone v. Mechanical Specialties, Inc.,
609 F.2d 956 (9th Cir. 1979) . 217a

Davis & Cox v. Summa Corp.,
751 F.2d 1507 (9th Cir. 1985) 207a

Menominee Tribe of Indians v. United States,
179 Ct.Cl. 496,
388 F.2d 998 (1967) 247a

Michael-Regan Co., Inc. v. Lindell,
527 F.2d 653
(9th Cir. 1975) 226a

Securities and Exchange Comm'n v. Securities Northwest, Inc.,
573 F.2d 622 (9th Cir. 1978) . 181a

Six Nations Confederacy v. Andrus,
610 F.2d 996,

998 (D.C.Cir. 1979) 213a

State of Washington v. Federal Power Comm'n,
207 F.2d 391 (9th Cir. 1953) . 197a

Temoak Band of Western Shoshone Indians, Nevada v. United States,
593 F.2d 994 (Ct.Cl. 1979) . . 214a

United States v. Lower Sioux Indian Community in Minnesota,
519 F.2d 1378 (Ct.Cl. 1975) . 213a

Washington Water Power v. Federal Energy Regulatory Comm.,
775 F.2d 305 (D.C.Cir. 1985) passim

State Court Decisions:

Miebach v. Colasurdo,
102 Wn.2d 170,
685 P.2d 1074 (1984) 221a

Tomlinson v. Clarke,
60 Wn.App. 344,
__ P.2d __ (Jan. 22, 1991) . . 221a

Constitutional Provisions:

U.S. Constitution, art. III 224a

U.S. Constitution, art. IV, § 3 . . 227a

Statutes and Regulations:

Federal statutes:

16 U.S.C. §§ 816 and 817 . . . . . 183a

25 U.S.C. § 70(a), (k), (u) . . . passim

25 U.S.C. § 70(a)(5) 184a

28 U.S.C. § 1291, 1292 . . . . . 223a

28 U.S.C. § 2106 . . . . . 223a

43 U.S.C. § 1166 . . . . . 216a

Other Authorities:

Treatises:

1 Kappler, Indian Affairs, Laws and Treaties, pp. 924-925 . . . . 191a, 192a

Restatement of Restitution, § 173, Comment *b* 222a

Restatement (Second) of Trusts, § 298, Comment *i* 222a

Administrative Decisions:

Washington Water Power Company, Federal Energy Regulatory Commission Project No. 2545:

-- Initial Decision, 11 FERC ¶63,001 169a

-- Opinion No. 117, 15 FERC ¶61,039 175a

-- Opinion No. 117-A, 25 FERC ¶61,001 180a

Other:

Act of Congress of March 2, 1899 . 212a

Act of Congress of March 3, 1905 passim

Dawes Act of 1887 . . . . . 252a

House Executive Document No. 63, 50th Cong., 1st Sess. 193a

17 Ind.Cl.Comm. 584 . . . . . 163a

I. STATEMENT OF ISSUES ON APPEAL.

1. Is Appellant collaterally estopped from relitigating WWP's right, title and interest in the Little Falls Dam site after presenting such questions to the District of Columbia Circuit Court of Appeals for decision, and receiving an adverse decision from that Court?

2. Is Appellant precluded from seeking damages from WWP on the theory that the Congress and Secretary of the Interior permitted WWP to obtain rights, title and interest in the Little Falls Dam site without providing "sufficient" consideration to Appellant, by the Indian Claims Commission Act, 25 U.S.C. § 70, and litigation thereunder?

3. Is Appellant barred from collaterally attacking a patent issued to Appellee in 1924?

4. Is Appellant precluded by laches, or the bona fide purchaser

doctrine, from seeking damages against WWP sixty-plus years after WWP purchased the subject property rights and erected a dam (and other structures) thereon?

5.(a) Should this Court decide Appellant's motion for summary judgment even though that motion was not argued to the trial court?

(b) Alternatively, do material fact questions preclude summary judgment regarding Appellant's claim to lands granted to WWP by the Secretary of the Interior prior to 1925, pursuant to a 1905 Act of Congress?

II. STATEMENT OF FACTS.

The facts related to the Little Falls Dam site, including the manner in which Washington Water Power Co. came into title of the relevant lands, are discussed in great detail in Washington Water Power v. Federal Energy Regulatory Comm., 775 F.2d 305 (D.C.Cir. 1985) (hereafter WWP v.

FERC), and will not be repeated here in such detail. The following entities will have the abbreviations shown: The Washington Water Power Co. (WWP); Spokane Tribe of Indians (Tribe); Federal Power Commission (FPC); Federal Energy Regulatory Commission (FERC); Secretary of the Interior or Department of the Interior (Interior).

A. PROCEDURAL HISTORY.

Although the Tribe commenced its action in the United States District Court for the Eastern District of Washington in 1982, the procedural history of the claim of the Tribe against WWP dates back to 1971, when the Tribe filed its Petition for Intervention before the FPC in connection with Project No. 2545.[1] A copy of the Tribe's Petition for Intervention before the FPC is found in Supp.Excerpts

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[1] Project No. 2545 is the project licensed by the FPC in 1972.

5-8.[2] By comparing the Petition for Intervention and the Complaint in this matter, it is clear that the Tribe was making the same claims against WWP in the FPC proceeding as they made in the action filed in the district court below.

Significantly, the Tribe asserted that it had a right to intervene, inasmuch as it "may be bound by the Commission's action in the proceeding and that said acts will detrimentally affect petitioner's rights herein." (Supp.Excerpts 6-7) The Tribe asserted that it was damaged by WWP's actions with respect to the Little Falls Development at issue, and that it had never been adequately compensated by WWP. (Supp.Excerpts 7) The Tribe thus asserted that the FPC had jurisdiction over the

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[2] For convenience, the Supplemental Excerpts of Record submitted by Appellee are cited herein as "Supp.Excerpts," with reference to the page number therein.

Little Falls hydroelectric sites, because the authorities on which WWP relied had never granted WWP the rights WWP claimed; instead, according to the Tribe, the subject property was tribal land. (Supp.Excerpts 5-8, 191-196, 274-75, 354-55, 361-405)[3]

In the FPC proceeding, WWP objected to the intervention by the Tribe and later, before FERC, WWP raised the issue of the jurisdiction of the FERC to determine WWP's property rights. The Tribe opposed WWP's objection to FERC

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[3] Note that at Supp.Excerpts 405, the Tribe argued that it had been inadequately compensated for WWP's activities at the project sites in forceful terms: "The writer can only retch at the foregoing terminology 'Grand Total' as compensation for what was one of the most valuable hydro power sites in the northwest." Id, p. 52 of Brief of Spokane Indian Tribe to Federal Energy Regulatory Commission, Project No. 2545, September 17, 1979.

jurisdiction,[4] and argued that FERC should retain jurisdiction and require WWP to obtain a license. The Presiding Administrative Law Judge (ALJ) ruled against WWP and in favor of the position taken by the Tribe, and the FERC retained jurisdiction. (Supp.Excerpts 312)

Interior also intervened in the FPC-FERC action. (Supp.Excerpts 177) The petition filed by Interior attaches a letter, incorporated by reference into the petition. (Supp.Excerpts 180, 183-86) Interior indicated that it "supports the position of the intervening Spokane Indian Tribes . . . for the reasons hereinafter stated." (Supp.Excerpts 184) Among the reasons thereinafter stated was Interior's concern for "the protection and utilization of the Coeur d'Alene and Spokane Indian Reservations, including the

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[4] See Supp.Excerpts at 460, 462-465.

payment of annual charges to the Tribes for the use of their lands." (Supp.Excerpts 186) Thus, two parties to the FERC proceeding advanced the Tribe's position in that action and herein.

In the FERC proceeding, hearings were held and an Initial Decision was issued by the Presiding ALJ on April 1, 1980. 11 FERC ¶63,001, at pp. 65,001, et seq. A copy of the Initial Decision is set forth in Supp.Excerpts at page 460.

As the ALJ noted, the Tribe argued that WWP did not have title to the lands purportedly within the Spokane Indian Reservation and that the site was acquired without just compensation or due process of law.[5] The ALJ stated that "the

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[5] In the Initial Decision, the Presiding ALJ stated the following:

> Counsel for the Spokane Tribe argues on brief that certain actions of the Secretary during the period of 1905 through 1924 were

appropriateness of the actions taken by the Department of the Interior or the Secretary would not be determined in these proceedings." However, the ALJ went on to

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> invalid and questions WWPC's title to the Indian reservation lands, where the Little Falls development is situated. It is further suggested that the site was acquired without just compensation or due process of law. The resolution of these questions is beyond the scope of this proceeding. The Presiding Judge has already ruled that the appropriateness of the actions taken by the Department of the Interior or the Secretary would not be determined in this proceeding. These actions will, however, be considered on their face in determining whether WWPC received a permit or valid existing right-of-way prior to June 10, 1920, in accordance with the provisions of Section 23(b) of the Federal Power Act.

11 FERC at 65,002.

state that he would consider all of the evidence relating to the actions of the Government "on their face" to determine whether or not WWP had "received a permit or valid existing right-of-way prior to June 10, 1920, in accordance with the provisions of Section 23(b) of the Federal Power Act."[6]

A review of the ALJ's Initial Decision shows that the ALJ considered and determined every issue relating to WWP's rights, title and interest in the land. Indeed, after discussing many of the facts and much of the evidence that was before him, he stated that "the evidence in this record must establish the nature of authorization, if any, which WWPC received from the Secretary prior to the enactment

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[6] Id.

of the Federal Water Power Act."[7] (Emphasis added.) 11 FERC at 65,004.

The ALJ then went on to discuss, in detail, much of the other evidence that was before him, evidence which was submitted by all parties, including Mr. Robert D. Dellwo on behalf of the Spokane Indian Tribe.[8] After further analysis of the evidence before him, the ALJ stated that WWP had the burden of showing "that it possesses a permit or valid right of way granted prior to June 10, 1920, as prescribed by Section 23(b) of the Federal Power Act...." 11 FERC at 65,006. The ALJ went on to discuss Big Bend Transit Co. v. United States, 42 F.Supp. 459 (E.D.Wash. 1941); see 11 FERC at 65,007-65,008. The

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[7] WWP suggests that the word "authorization" should be read to mean "title."

[8] Mr. Dellwo is the same Robert D. Dellwo that is representing the Spokane Indian Tribe before this Court.

ALJ undertook substantial efforts to distinguish WWP's rights and title from those discussed in Big Bend. Id.

After reviewing all of the evidence[9], the ALJ concluded that WWP "does not have a valid pre-1920 permit"[10]. In substance, the ALJ concluded that WWP does not have the necessary right, title and interest to construct, operate and maintain the Little Falls Development, and therefore was not exempt under the Federal Water Power Act of 1920 or the Federal Power Act of 1935, as amended.

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[9] The evidence that was presented or could have been presented in the FERC proceeding was the same evidence that would have been presented to the district court below.

[10] 11 FERC at 65,008. Construction of the Act of March 3, 1905, by Interior, which was charged with administering the statute contemporaneously with its enactment, is entitled to substantial deference. Blum v. Bacon, 457 U.S. 132, 141 (1982); and WWP v. FERC, supra at 322.

There are other notable statements made in the ALJ's Initial Decision. For example, the ALJ discussed correspondence between WWP and Interior. The ALJ stated:

> In a letter to the Assistance Commissioner of Indian Affairs, dated May 5, 1909, WWPC suggested the possibility of acquiring additional Spokane Indian reservation lands under the Act of 1905, for the purpose of developing another power plant, and inquired about compensation for such lands as well as the character of the grant which the Secretary would issue. On May 8, 1909, the Secretary responded that compensation would be determined according to the Act of March 2, 1899, and that the title granted under the Act of 1905 would be a full and permanent title, revocable only for non-use.[11]

The ALJ also decided the navigability of the Spokane River[12]. WWP filed briefs on exceptions and appealed the ALJ's

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[11] 11 FERC at 65,003 (emphasis added).

[12] 11 FERC at 65,008-65,010.

Initial Decision to the FERC. The first decision concerning WWP's rights, title and interest at the Little Falls development is set forth in 15 FERC ¶61,039, ¶¶61,064 et seq. In FERC Opinion No. 117 (id.), the FERC noted that WWP had acquired land and water rights on the Spokane River and noted that in 1924, "WWPC obtained a patent for the lands it acquired." The FERC then stated the following:

> In order to resolve the ultimate question of whether WWPC is required to license the continued operation and maintenance of its Little Falls water power development, it is necessary to consider, first, the nature and extent of the pre-FWPA authorization that will substitute for a current license under the FPA to continue to operate and maintain a hydro-electric development. And it is necessary to consider, second, the nature of such authorization

held by WWPC under the Act of March 3, 1905.[13]

From the foregoing, it is obvious that the FERC considered and determined the nature of the rights, title and interest of WWP which were acquired pursuant to the Act of March 3, 1905, in order to determine whether or not the Little Falls Development was exempt from licensing under the Federal Power Act.

The FERC noted that the Act of March 3, 1905, authorized Interior to grant land to a water appropriator for the erection of dams and hydro-electric facilities.[14] The FERC further noted that Congressman Jones, who sponsored the bill, stated that the Act of March 3, 1905, "authorizes the acquirement of title to

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[13] 15 FERC at 61,065. This Opinion is set forth in full at Supp.Excerpts 460.

[14] 15 FERC at 61,069.

this land...."[15] In its Opinion No. 117, the FERC stated the following:

> There is considerable controversy in this proceeding with respect to the nature of the interests in the lands of the Spokane Indian Reservation granted under the Act of March 3, 1905. While the Spokane Indian Tribe has asserted a constitutional challenge to WWPC's title under that Act, the presiding judge has said that WWPC's title is not in issue. WWPC contends in its brief on exceptions (1) that it acquired "all federal right, title and interest to the water power and property of the Little Falls development", (1) that the judge decided that it has no title, (2) that the judge decided that it has no title, (3) that the Commission cannot determine its title, and (4) that the government is estopped from challenging its title.
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> We agree with the presiding judge that it is not necessary to resolve the constitutional challenge to WWPC's title under the Act of March 3, 1905, to determine whether the Little Falls development is required to

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[15] Id.

be licensed under the FPA. If the lands of the Spokane Indian Reservation were granted in fee simple under the Act of March 3, 1905, they would have ceased being part of that reservation and would no longer have been "reservations" within the purview of Section 3(2) of the FPA, because the United States would not have retained any property interest in them. Accordingly, the continued operation and maintenance of the Little Falls development on those lands would not today be prohibited (without authorization) by reason of that development's utilizing "reservations" of the United States. If, on the other hand, those lands were granted in less than fee simple, as we find, *infra*, (of if the grants are void, which issue is not reached), the United States continues to have a reserved interest in them, they continue to be "reservations" within the purview of Section 3(2) and the continued operation and maintenance of the Little Falls development is prohibited (without authorization) by reason of its utilizing "reservations" of the United States.

> While ordinarily the Commission does not determine issues associated with title to lands, the Commission can and will do so to the extent necessary to administer the FPA. See Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960), wherein the Commission determined whether Indian lands were "reservations" within the purview of Section 3(2) for the purpose of determining whether it would be required to make a finding pursuant to Section 4(e) that the license in question would "not interfere or be inconsistent with the purpose for which such reservation was crated or acquired."[16]

As can be seen from the foregoing, the FERC did consider and determine WWP's rights, title and interest to the lands it acquired and owned with respect to the Little Falls Development. This is also apparent from a review of Opinion No. 117, which is set forth in its entirety in the Supp.Excerpts at page 460. The FERC

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[16] 15 FERC at 61,069-61,070 (emphasis added).

considered all of the evidence that was before the ALJ that had been presented by all parties, including the Tribe and WWP concerning WWP's title to land in order to decide whether WWP could continue to maintain and operate the Little Falls Development without a license issued by the FERC. 15 FERC at 61,076.

WWP then filed an application for rehearing, which was denied. Ultimately, the FERC issued Opinion No. 117-A, in which the FERC discussed, once again, the nature of the rights, title and interest of WWP at the Little Falls hydro-electric development and again concluded that WWP did not have sufficient rights, title and interest to allow it to continue to operate and maintain the Little Falls hydro-electric development without obtaining a license under the Federal Power Act. 25 FERC ¶61,002, ¶¶61,001, et seq., Supp.Excerpts 477.

WWP sought judicial review of the FERC's adjudication of WWP's rights, title and interest with respect to the Little Falls hydro-electric development. The Tribe again vigorously contested WWP's position that its prior right, title and interest to the Little Falls site deprived the FERC of jurisdiction over the site.[17] Finally, on judicial review, the United States Court of Appeals for the District

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[17] This Court may take judicial notice of filings in other cases in which a litigant before this Court was a party. Securities and Exchange Comm'n v. Securities Northwest, Inc., 573 F.2d 622 (9th Cir. 1978). To that end, the cover page and Statement of Issues for the Tribe's brief to the D.C. Circuit is attached hereto as Appendix A, although it is not otherwise part of the record on this appeal. If such is improper, WWP would withdraw the submission. However, because the similarity between the issues advanced by the Tribe before the D.C. Circuit Court of Appeals and those advanced before this court is so striking, and the Tribe appears to disclaim that similarity, it is felt that such should be offered in the interests of justice.

of Columbia Circuit issued its opinion on October 18, 1985, in WWP v. FERC, 775 F.2d 305 (D.C.Cir. 1985).

The D.C. Circuit Court of Appeals considered all of the evidence presented by all parties, including the Tribe and its attorneys and WWP and its attorneys[18] relating to WWP's rights, title and interests in the Little Falls hydro-electric development. The Court concluded that WWP "now owns the rights, title, interest, authority and right of way necessary for the construction, operation and maintenance of the Little Falls power development" and is therefore exempt from the application of the Federal Power Act

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[18] The Tribe was represented by Robert D. Dellwo, the same attorney who represents the Tribe before this Court and the court below, and WWP was represented by Jerry K. Boyd, the same attorney who represents WWP before this Court and the court below.

by Sections 23(a) and (b), 16 U.S.C. §§ 816 and 817. Id. at 336.

As shown in the affidavit of Jerry K. Boyd, WWP was required to present evidence concerning its rights, title and interest to the Little Falls Development and defend those rights, title and interest against attacks made by the Tribe and two agencies of the United States--the FERC staff and Interior on behalf of the Tribe. (Supp.Excerpts 204-209) The efforts required by WWP to establish its rights, title and interests and to defend those rights, title and interests were of great magnitude and extended from 1971 to 1985, and required the expenditure of many tens of thousands of dollars in legal fees and costs through all of the proceedings before the FERC and the D.C. Circuit Court of Appeals.

Prior to the FPC/FERC litigation, the Tribe made claim against the United States

pursuant to 25 U.S.C. § 70(a). (Supp.Excerpts 191) That statute provided that all tribal claims against the United States pre-dating 1946 must be brought before 1952. Claims related to inadequate compensation for tribal lands are expressly included in the statute, 25 U.S.C. § 70(a)(5), and claim was made under that section. (Supp.Excerpts 191-192) All claims were settled therein. See 17 Ind.Cl.Comm. 584.

B. COURT PROCEEDINGS.

While the issue concerning WWP's rights, title and interests at the Little Falls hydro-electric development was being litigated before the FERC, the Tribe commenced an action in the United States District Court for the Eastern District of Washington in 1982 (Docket No. CV-82-00753-AAM). The action was commenced between the issuance of FERC

Opinion No. 117 and FERC Opinion No. 117-A.

In 1984, WWP moved for summary judgment of dismissal against the Tribe, which summary judgment was based upon much of the evidence that had been presented in the FERC proceeding. (CR 18, Motion dated December 21, 1984.) The Tribe requested a stay of proceedings before the court, arguing that it was attempting to obtain either funding from or the intervention of Interior. (Supp.Excerpts 537-538)

The opinion of the United States Court of Appeals for the District of Columbia Circuit was issued in October, 1985, while the stay of the district court action was still in place. Subsequently, the district court stay was lifted and the matter proceeded, with a trial being scheduled by the court. (CR 65, Order dated May 15, 1989.) WWP moved to amend its answer and counterclaims to include a

defense and counterclaim based upon collateral estoppel, which was, in turn, based upon the decision of the United States Court of Appeals. (CR 67, Motion dated September 15, 1989.) Such motion was granted, WWP filed its amended answer and counterclaim, and the matter was finally heard on November 9, 1989. (Excerpts 71)

A transcript of the proceeding before the district court shows that the only matter that was given consideration by the court was WWP's motion for summary judgment of dismissal based upon collateral estoppel. (Excerpts 71-96) The court ruled from the bench that it was dismissing the Tribe's claims against WWP based on collateral estoppel and that the court would be issuing a written decision. The court ultimately did issue a written decision which was filed with the clerk of the Court on February 8, 1990. (Excerpts 65) In that decision, the court ruled in

favor of WWP and dismissed WWP from the lawsuit. Subsequently, the Tribe filed a motion for reconsideration, which was denied by order of the court entered on April 8, 1990. (Excerpts 97)

After the entry of the order of the court denying the Tribe's motion for reconsideration, the Tribe filed an amended complaint to state a claim against the United States of America. The Tribe served a copy of the amended complaint on WWP's attorneys. (Affidavit of Jerry K. Boyd dated September 20, 1990, Supp.Excerpts 530) After discussions between the attorneys for the Tribe and WWP, a stipulation and proposed order was signed on behalf of WWP and the Tribe. The original of the stipulation and proposed order was then sent to the court for signature and entry or filing. A copy of the stipulation and proposed order was attached to the Affidavit of Jerry K.

Boyd, CR 180, filed September 21 1990. The Tribe did not serve any other papers on WWP after the service of the amended complaint.

On or about September 14, 1990, the Tribe filed and presented, *ex parte*, various motions and orders to the district court. Those orders included, *inter alia*, a judgment quieting title in the Tribe to some of the very land claimed and owned by WWP at the Little Falls hydro-electric development. (See CR 177, Judgment dated September 14, 1990) Four days after the *ex parte* presentation of motions, orders and judgment to the court, the Tribe provided a copy of such orders to WWP's undersigned attorneys. (Supp.Excerpts 530-532)

The undersigned attorneys immediately moved to amend the judgment so that the judgment would conform with the determinations of the D.C. Circuit Court of Appeals and the prior determinations of

the United States District Court for the Eastern District of Washington. CR 178, Motion dated September 21, 1990. The district court denied WWP's motions and entered its order on October 12, 1990. (Supp.Excerpts 534) WWP then filed its notice of appeal with respect to the order denying WWP's motion to amend judgment, which notice of appeal was filed on November 9, 1990, and which is the subject matter of a separate appeal to this Court.[19]

The statement of the Tribe on page 13 of its brief concerning the stipulation of the parties and judgment entered quieting the Tribe's title to the river and the riverbed did not include any stipulation or agreement from or on behalf of WWP. The

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[19] Apparently due to clerical error, the clerk's office never took action on WWP's appeal, and there is no docket number at present. WWP's Notice of Appeal is attached hereto as Appendix B.

judgment was entered *ex parte* by the Tribe without any notice to WWP; that the order WWP has vehemently objected to said order, and understands that the order is not applicable to WWP and, as to WWP, is a nullity and is void. (See Supp.Excerpts 535) The *ex parte* issuance of the judgment quieting title in the Tribe is the subject matter of a separate appeal taken by WWP and will not be further discussed in this proceeding.[20]

C. FACTS RELATED TO TRIBE'S MOTION.

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[20] The undersigned attorneys were shocked and surprised by the *ex parte* actions taken on behalf of the Tribe and believe that such actions violate any concept of fair play, substantial justice or due process and believe that such actions were done *ex parte* by the Tribe as part of a concerted effort to gain an advantage in other proceedings. See Supp.Excerpts 530. In WWP v. Tribe, E.D.Wash. Cause No. CV-82-00753-AAM, WWP is challenging an attempt by the Tribe to impose a tax on WWP's Little Falls Development. The ownership of WWP's land may become significant in that litigation.

In discussing such matters, the undisputed facts should be set forth and are as follows: In 1880, an Army general commanded that his aide-de-camp issue an order setting aside certain territory for the use of the Tribe. (1 Kappler, Indian Affairs, Laws and Treaties, pp. 924-925, Supp.Excerpts 120) Reference is made in the military order to "a promise made in August, 1877, by E.C. Watkins."

This may be an erroneous citation to a purported agreement which is referred to in paragraph VII of the Complaint on pp. 3 and 4. It should be noted that in the Tribe's Complaint at p. 3 at about L. 24, according to the Complaint, the Tribe agreed to go upon an area of land which had the Spokane River as a boundary "with the view of establishing our permanent homes thereon and engaging in agricultural pursuits." (Emphasis added.)

In 1881, President R.B. Hayes issued an Executive Order setting aside and reserving "for the use and occupancy of the Spokane Indians, a tract of land which also had, as its boundary, the Spokane River." (1 Kappler, Laws and Treaties, supra, p. 925, and paragraph 10 of the Complaint.) There is no showing in the record that Congress ever authorized the establishment of the Spokane Indian Reservation.

Indeed, it is clear that in 1872, the President first established an Indian reservation for the Spokane Indians and other Indians which included the later Spokane Indian Reservation. In 1872, the President revoked such Executive Order and established an Indian reservation by another 1872 Executive Order for the Spokane Indians in an area which includes what is now the Colville Indian Reservation. (1 Kappler, Laws and

Treaties, pp. 915-916, supra. Furthermore, it is clear that Spokane Indians were supposed to be removed to the Coeur d'Alene Indian Reservation in Idaho, the Jocko (Flathead) Indian Reservation in Montana, or the Colville Indian Reservation. (House Executive Document No. 63, 50th Cong., 1st Sess., pp. 4-11, 30-34, 45, 51-56, 58-60, Supp.Excerpts 52, and 1 Kappler, Laws and Treaties, supra, pp. 449, 453-454.)

III. ARGUMENT

A. THE TRIBE IS COLLATERALLY ESTOPPED FROM RE-LITIGATING OWNERSHIP INTERESTS AT THE LITTLE FALLS SITE.

It is axiomatic that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction... cannot be disputed in a subsequent suit between the same parties or their privies." Montana v. United States, 440 U.S. 147, 153 (1979), quoting Southern Pacific R.Co. v.

United States, 168 U.S. 1 (1897). Thus, questions put in issue and directly determined by the District of Columbia Circuit in WWP v. FERC, 775 F.2d 305 (1985), cannot be re-litigated between the Tribe and WWP. See also City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) (once federal license is granted following hearing in which State intervened, State cannot file second suit challenging licensee's authority to hold federal license).

The D.C. Circuit case decided all facts essential to the Tribe's claim of ownership to the Little Falls site, including the following:

(1) The rights derived from the Act of Congress of March 3, 1905, by WWP and by WWP's predecessor in interest, David Wilson;

(2) Wilson/WWP compliance with said 1905 Act, which includes compensation as expressly provided for by Congress in Section 3 of

that Act (see also Big Bend Transit, 42 F.Supp. at 464-66);

(3) Effect of compliance with the 1905 Act;

(4) Patent rights held by WWP;

(5) Navigability of the Spokane River at Little Falls;

(6) The effect of the licenses issued to WWP and Mr. Wilson by the Secretary of the Interior, and the patent issued to WWP in 1924.

The Tribe's present posture is all the more surprising since it, and not WWP, put the question of tribal rights and remedies in issue in the FERC proceeding. See Supp.Excerpts 226-228, wherein the Tribe prays for the following relief before the FPC:

...

3. That the Commission assume jurisdiction as a judicial forum to litigate and decide the rights of the Spokane Tribe with regard to the past, present and future operation of Little Falls Dam and that it award the Tribe damages and compensation for the

initial taking of the site the dam occupies and its past and future operation as a power dam.

4. That the Commission by its orders provide for the eventual extinguishment of all the rights the Washington Water Power Company may have to Little Falls Dam site and the reversion of those rights to the Spokane Tribe of Indians.

(Supp.Excerpts 227) In Appendix A, the Court will note that the Tribe presented the same issues to the District of Columbia Circuit Court of Appeals.

Of course, collateral estoppel even applies to a final decision of an administrative agency. University of Tennessee v. Elliott, 478 U.S. 788 (1986). Here, however, we have more than a mere administrative determination of right, title and interest in the Little Falls site. We have a judicial determination on appeal from the administrative decision,

as in City of Tacoma v. Taxpayers of Tacoma, supra.

In City of Tacoma, the State of Washington asserted that a FPC license could not be granted to the City over the objections of the City's creator, the State. On appeal from the Commission's determination that such a license was proper, this Court affirmed. State of Washington v. Federal Power Comm'n, 207 F.2d 391 (9th Cir. 1953). During pendency of the appeal therein, the State opposed a bond issue by the City, on grounds already decided by this Court. See 357 U.S. at 331-332. The Washington Supreme Court held in favor of the State, but was reversed by a unanimous Court:

> At the threshold of this controversy petitioner, the City, asserts that... this question has been finally decided by the decision of the Court of Appeals (207 F.2d 391) and this Court's denial of certiorari (347 U.S. 936); and that respondents' cross-

> complaints ... in the Washington courts have been only impermissible collateral attacks upon the final judgment of the Court of Appeals. If this assertion is correct, the judgment of the Supreme Court of Washington now before us would necessarily have to be reversed, for obviously that court, like this one, may not, in such a case, re-examine and decide a question which has been finally determined in a court of competent jurisdiction in earlier litigation between the parties.

City of Tacoma, 375 U.S. at 334 (emphasis supplied). Holding that this Court's decision was a "final" determination by a court of competent jurisdiction, the United States Supreme Court held that the later proceedings "were impermissible collateral attacks upon and *de novo* litigation between the same parties of issues determined by the final judgment of the Court of Appeals." 357 U.S. at 341.

The present case is indistinguishable in principle from City of Tacoma. The

nature and quality of WWP's rights and title to the Little Falls dam site were foundation issues essential to the WWP v. FERC decision that WWP was not subject to FERC jurisdiction in operating that facility. Before the WWP v. FERC court could decide whether WWP's Little Falls Development was exempt under the Federal Power Act, the court was required to determine WWP's property rights--and the court did so. Accordingly, under City of Tacoma, the Tribe is not permitted to re-litigate WWP's right, title and interest herein.

Similarly, in University of Tennessee v. Elliott, supra, the Supreme Court held that the factual findings of a state administrative agency were entitled to preclusive effect in a subsequent action brought under 42 U.S.C. § 1983. Thus, a party is required to appeal an adverse decision regardless of the forum, if that

party wants to avoid the preclusive effect of the adverse decision. That is what WWP did when it appealed the adverse FERC decision to the District of Columbia Circuit Court of Appeals. The Tribe may not collaterally attack the WWP v. FERC decision in a subsequent action.[21]

The Tribe could have petitioned for a writ of certiorari to review the adverse decision it received in WWP v. FERC. It did not. The Tribe may not collaterally attack WWP v. FERC in this case.

B. ALL OF THE ELEMENTS TO APPLICATION OF COLLATERAL ESTOPPEL, AS SET FORTH BY THE TRIBE, HAVE BEEN MET.

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[21] Note that in the University of Tennessee litigation, as here, the federal court proceedings were pending at the time the "other" decision was rendered. 478 U.S. at 790-791. Nonetheless, the determination in the "other" action was entitled to preclusive effect. That is also true of the City of Tacoma case, in which the bond validation (second) suit was filed while the appeal to this Court (first suit) was still pending.

WWP urges that this Court is bound by the principles advanced in Montana v. United States and City of Tacoma v. Taxpayers of Tacoma, supra, as addressed above. However, the Tribe has advanced the proposition that collateral estoppel can only be applied if a set of four elements is met. The Tribe states these elements as follows:

> Collateral estoppel may only be invoked if (1) the issue previously adjudicated is identical to that presently raised; (2) the issue was actually decided in the prior case; (3) prior determination of that issue was necessary to the entry of judgment in the prior action; (4) the party against whom the doctrine is to be applied was afforded a full and fair opportunity to litigate the issue in the prior proceeding.

Brief of Appellant, at 20. Interestingly, the Tribe does not cite a single Ninth Circuit case for the elements to cc1lateral estoppel as the Tribe advances them.

The elements advanced by the Tribe will not necessarily bind this Court, as is evident from Mr. Justice Rehnquist's concurrence in Montana v. United States, 440 U.S. 147, 164 (1979). However, because the Tribe advances these elements and because they are met in any event, WWP will address them in turn.

1. Identity of issues.

The Tribe glosses over this point, ignoring its own pleadings before the FERC, the arguments it made to the Court in WWP v. FERC, and the D.C. Circuit's opinion. The Tribe asserts that the questions posed to that Court include only matters of rights-of-way and exemptions. Brief of Appellant, at 24. The Tribe thereupon argues that these matters are "clearly not identical" to its claims to ownership of WWP's land and damages from the Little Falls site and WWP's operation of Little Falls for 80 years.

In order to reach the question of FERC jurisdiction, the D.C. Circuit was required to decide the nature of the rights WWP purchased pursuant to the Act of Congress of March 3, 1905, and the approvals and patents issued by Interior. See Appendix A to this Brief. These factual matters are identical to those the Tribe wishes to re-litigate here.

As Montana v. United States makes clear, the "identity of issues" point permits the Court to pierce the pleadings and determine the questions and positions actually advanced by the parties. In Montana, unlike the case at bench, the distinguishable issues regarding state taxation of federal contractors were presented in the second suit, since different years were at issue than in the former proceedings. Notwithstanding the distinction, the decision in the first case was given preclusive effect.

WWP submits that, as in Montana, the factual matters presented to the District of Columbia Circuit had an "identity" to those presented herein. Accordingly, issue preclusion should be applied to bar the Tribe's claims.

2. Actual decision in D.C. Circuit case.

In WWP v. FERC, supra, the Court actually considered all relevant evidence, decided all issues surrounding the Act of Congress of 1905, compensation as exclusively provided in Section 3 thereof, and all land titles and water rights obtained by Wilson and WWP which are now owned by WWP. See 775 F.2d at 336 (WWP "now owns the rights, title and interest necessary for the construction, operation, and maintenance of the Little Falls power development"). Those are the precise factual issues presented here.

The Tribe argues that the fact that, at times, the D.C. Circuit used the term "right of way" to describe the interest received by Wilson and WWP indicates that the Court did not determine the precise nature of the interest received by WWP. The Tribe states, without citation, that "[e]ach member of the [D.C. Circuit] court assumed without deciding that WWP acquired some unspecified interest in the subject lands and water." Brief of Appellant, at 26.

This argument ignores the fact that the D.C. Circuit Court had to determine what interest, if any, WWP acquired over 80 years ago at Little Falls to determine whether operation of the hydroelectric facility there was subject to FERC jurisdiction. If no patent was issued, if WWP had not paid the requisite compensation, if WWP had not perfected its interest in accordance with applicable

law, if the Spokane River was navigable (and thus Corps of Engineers approval might have been required)[22], the D.C. Circuit decision would have been different.

That Court actually decided that WWP acquired land and water rights at the Little Falls dam site and that WWP acquired all of the property rights from the Congress and Interior required to construct, operate and maintain the Little Falls Development. Indeed, there is strong evidence that the Court decided WWP has at least a limited fee with implied reverter for non-use. WWP v. FERC at 325.

It is clear that the WWP v. FERC court construed the 1905 Act and the facts

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[22] The State of Washington now recognizes that the Spokane River is not navigable at that point. CR 171. However, due to the Tribe's assertions before the Commission and the D.C. Circuit, WWP was forced to prove that point therein. See 775 F.2d at 317.

applicable to Little Falls Development and concluded that WWP and Interior had congressional authority to grant land to WWP and did grant and convey land to WWP. Id. at 309, 310, 312, 313, 319, 320, 323, 324, 325, 326, and 336. It is also clear that the WWP v. FERC court concluded that the rights under the 1905 Act are "permanent" and constitute "title" to the land. Id. at 315, fn. 7, and 316.

Even if the WWP v. FERC opinion was not clear, the necessary inference from the judgment and the pleadings clearly show WWP title to the Little Falls property was decided by the WWP v. FERC court and are entitled to preclusive effect. Davis & Cox v. Summa Corp., 571 F.2d 1507, 1518 (9th Cir. 1985).

3. Issues necessarily decided.

As demonstrated above, the effect of the instruments and Acts of Congress of 1905-1924 were foundational matters before

the D.C. Circuit, necessary to the determination of FERC jurisdiction over the Little Falls site and facilities.

4. Full and fair opportunity for hearing.

The Tribe chose, over WWP's objections, to use the FPC/FERC as a forum for determining its interests in and right to damages for WWP's use of the Little Falls site. The Tribe submitted lengthy briefs to the Commission. (Supp.Excerpts 273, 345) The Tribe does not contend that its arguments were not read or considered.

The Tribe does argue that the absence of sustained discussions of the more arcane aspects of Indian law in the decisions of the FPC/FERC proceedings indicates that its position was not fully and fairly determined. Brief of Appellant, at 30. This argument does not bear scrutiny.

Any claim of the Tribe to a compensable interest in lands must arise from some treaty or Act of Congress. Sioux Tribe of Indians v. United States, 316 U.S. 317, 326 (1942). By examining and deciding the relevant Acts of Congress and Interior between 1905 and 1923, the District of Columbia Circuit Court of Appeals did, in fact, determine that WWP has and owns the rights, title and interests at issue herein. 775 F.2d at 336. The corollary (that the Tribe does not have those rights, and was paid for them pursuant to congressional directive) does not require profound exploration of the nuances of Indian law. Obviously, no two persons can own the same property.

To summarize: the Tribe chose to put its rights in issue before the FPC/FERC and the D.C. Circuit Court of Appeals. It vigorously advanced its position, and it lost. It is no more unfair to bind the

Tribe to the decision it aided than to bind any other litigant to a prior adverse decision on the merits.

C. THE TRIBE'S DAMAGES CLAIMS ARE BARRED BY *RES JUDICATA*, AND THE DOCTRINE AGAINST COLLATERAL ATTACK.

The Tribe's damages claims herein are really, in substance, an argument that Congress and Interior should not have permitted Wilson, and through Wilson, WWP, to gain title to reservation lands at the price set by Congress. When reduced to its essential basis, the Tribe's claim is this: Congress should not have given our lands away so cheaply, and since WWP ultimately benefitted from Congress's acts, WWP should pay us more, now.

The Tribe's claims are not well taken. Several grounds exist to support dismissal of these claims.[23]

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[23] This Court has held that it would affirm the trial court on any basis fairly presented by the record. A&A Concrete v.

1. Exclusive compensation method.

First, in the Act of Congress of March 3, 1905, Congress provided an exclusive method of compensation for the Little Falls site lands. Section 3 of the 1905 Act provides:

> **Sec. 3.** That the compensation to be paid for said land by said applicants shall be determined in the manner prescribed in section three of the Act of March second, eighteen hundred and ninety-nine, entitled "An Act to provide for the acquiring of rights-of-way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes."

There is no question that such payment was in fact made. The Tribe has not asserted to the contrary. Rather, in briefs filed with the FPC, the Tribe asserted that the amount mandated by Congress was inadequate. See Supp.Excerpts 405.

White Mountain Apache Tribe, 781 F.2d 1411, 1415 (9th Cir. 1986).

WWP submits that Section 3 of the Act of Congress of March 3, 1905, by reference to the Act of Congress of March 2, 1899, provided the exclusive means by which Congress intended the Tribe to be compensated for the Little Falls dam site. See Blum v. Stenson, 465 U.S. 886 (1984) (where the resolution of a question of federal law turns on a statute, the Court looks first to the statutory language, and to congressional intent if the language is unclear).

The Act of Congress of March 3, 1905, clearly sets forth the intent of Congress that any person who would use the Spokane River at Little Falls for hydroelectric purposes could obtain the necessary property rights by paying a defined level of compensation. That being unquestionably done in this case, the Tribe has no recourse against the person acting in

accordance with congressional will. The recourse is against Congress, if any.

2. *Res judicata* effect of Indian Claims Commission Act.

All claims related to takings of Indian land for inadequate consideration before 1946 were covered by the Indian Claims Commission Act, 25 U.S.C. § 70(a), et seq. All claims that relate to the taking of Indian land under federal law were directed to that Commission, 25 U.S.C. § 70(a)(5), and the Indian Claims Commission Act provided the "exclusive system for determination of claims" covered thereby. Six Nations Confederacy v. Andrus, 610 F.2d 996, 998 (D.C.Cir. 1979) (tribe members not free to pursue other avenues to make claims); United States v. Lower Sioux Indian Community in Minnesota, 519 F.2d 1378 (Ct.Cl. 1975) (claim stated under 25 U.S.C. 70(a) for sale of reservation

lands by United States); Temoak Band of Western Shoshone Indians, Nevada v. United States, 593 F.2d 994 (Ct.Cl. 1979) (tribe could not assert title to aboriginal lands after suit to recover compensation for them).

Under 25 U.S.C. § 70(a), all claims for lands taken under federal law are lost, if not made in a timely fashion, absent fraud. See Lower Sioux Indian Community, supra, (permitting amendment to relate back, thus avoiding forfe ture of untimely claims). The Tribe did make such a claim, Supp.Excerpts 191, including claims for the taking of tribal lands without just compensation. That claim was settled for over $6 million, and under 25 U.S.C. § 70(u), congressional appropriations of funds made the settlement final. See Six Nations Confederacy, supra.

Under applicable principles of *res judicata* and language of the Indian Claims Commission Act itself, all claims the Tribe might have brought against the United States for taking tribal lands are barred, whether they were actually made or not. 25 U.S.C. § 70(k). The Tribe's claim here is, in essence, a claim that the United States sold off tribal lands without requiring the purchaser, Wilson and WWP, to pay adequate consideration. This Court should apply *res judicata* to bar the instant damages claims.[24] See Nevada v. United States, 103 S.Ct. 2906 (1983).

3. Collateral attack on patent.

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[24] It is beyond dispute that the actions of WWP were authorized by the Act of March 3, 1905. WWP v. FERC, supra. Indeed, one claim of the Tribe is for destruction of alleged fisheries 80 years ago. Such destruction, if it occurred, arose out of conduct authorized by Congress and Interior.

A "patent" is "the customary instrument used by government to transfer legal title." Shaw v. Kellogg, 170 U.S. 312, 342 (1898). The government conveyed a "patent" to WWP when it approved the applications and maps submitted, as noted in Big Bend Transit Co. v. United States., 42 F.Supp. 459, 467 (E.D.Wash. 1941). A patent was issued finally in 1924. (Supp.Excerpts 438-445)

The United States is barred from challenging a patent after six years following the date of transfer, absent fraud or other recognized equitable ground. 43 U.S.C. § 1166. Since any compensable interest in lands claimed by the Tribe must arise from an Act of Congress, Sioux Tribe of Indians v. United States, supra, 316 U.S. at 326, it follows that the Tribe is subject to the same limitations in challenging a patent as is the United States.

No fraud or recognized equitable ground for challenging the title transferred to WWP appears in the present record. Certainly it is undisputed that WWP has been using the site for over 80 years, and there is no question of the Tribe's knowledge of WWP's activities. Accordingly, WWP submits that the Tribe cannot attack the patent issued, or its equivalent, 80 years later.

4. Laches bars the Tribe's damages claims.

No person may permit generation after generation to be born, grow old and die, before bringing claims against another. The Tribe herein makes claims for damages for, among other things, alleged fisheries that disappeared 80 years ago or more, and which no one alive remembers.

Laches bars a claim where unexcused and unreasonable delay has caused prejudice. Boone v. Mechanical

Specialties, Inc., 609 F.2d 956 (9th Cir. 1979); Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155 (5th Cir. 1982). In this case, the Tribe has permitted sufficient time to pass that anyone with knowledge of actual damage allegedly caused by the WWP facility, if any, has long since passed away. For example, any damage to fisheries depends upon witnesses (for both sides) who are no longer living. Thus, WWP is precluded from use of any live witnesses or other contemporary evidence tending to question the existence or value of the alleged fisheries.

This case is a perfect example of the kind of case for which the laches defense was developed. WWP should not be forced to try damages issues through hearsay testimony, or through historical documents that may or may not have considered all relevant evidence bearing on the subject, and which are not subject to cross-

examination. This Court should hold that the Tribe's damages claims are barred by laches.

5. WWP is in the position of a bona fide purchaser.

Over 85 years ago, WWP purchased rights from David Wilson, applied for and received various governmental approvals, and expended millions of dollars on the Little Falls site. Even in an adverse decision, the FERC Administrative Law Judge recognized the good faith with which WWP has asserted title and interest, derived from Congress, for over 80 years. (Supp.Excerpts 312, 342)

The Tribe's position in this lawsuit would lead to the conclusion that no one can rely upon land titles, no matter what federal governmental acts intervened and created a private interest in such land. Certainly if the Tribe is permitted to make a claim that Congress did not grant

David Wilson or WWP what everyone understood it did, or that the compensation scheme set by Congress was inadequate, there is no reason why any tribe anywhere cannot assert claims against the present owners of land to which a tribe may have some colorable, if ancient and disputed, claim. Conceivably, if the Tribe prevails here, can the Tribe sue to recover money or land from the non-Indians who bought land under the homestead laws pursuant to Act of Congress?

WWP believes that it was and is entitled to rely upon the rights bestowed by Congress and Interior upon WWP's predecessor, which WWP never had any reason to question. Indeed, even if the latter portion of WWP's long and rightful occupancy of the Little Falls site, both courts to confront the issue have

concluded that WWP owns the lands. Big Bend Transit, supra; WWP v. FERC, supra.

WWP submits that when it paid David Wilson for the rights stemming from the Act of Congress of March 3, 1905, and when it perfected the interests therein, without any reason to question the actions of Congress and Interior, WWP was in the position of a bona fide purchaser for value. A bona fide purchaser for value is one who pays a valuable consideration property without knowledge of the claims of another. Miebach v. Colasurdo, 102 Wn.2d 170, 685 P.2d 1074 (1984).[25] The adequacy of the consideration paid is immaterial, so long as it is not so inadequate as to suggest fraud.

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[25] The Washington Court of Appeals has recently decided that a contract purchaser of real property, who records without notice of adverse claims, is entitled to Bona Fide Purchaser (BFP) status. Tomlinson v. Clarke, 60 Wn.App. 344, __ P.2d __ (Jan. 22, 1991).

Restatement of Restitution, § 173, Comment *b*; Restatement (Second) of Trusts, § 298, Comment *i*.

As the long holder of property rights assigned by a transferee from Congress and Interior, WWP is entitled to rely on its ownership interest. WWP knows of no authority suggesting that it is required to doubt or mistrust congressional actions.

D. THIS COURT HAS APPELLATE JURISDICTION ONLY OVER THE TRIBE'S MOTION WHICH WAS DISMISSED, AND SHOULD NOT DECIDE ISSUES NEVER DECIDED BELOW.

After the district court granted WWP's motion for summary judgment, the Tribe's motion for summary judgment became moot. For that reason, and not for any reasons related to the merits, the district court denied the Tribe's motion. (CR 138, Order entered 2/8/90.)

The Tribe requests this Court to review the Order of February 8, 1990, not

for mootness, but on the merits. That would be the first time a court has ruled on the merits of the Tribe's motion, which was vigorously contested, though never decided, below. (CR 103, Memorandum filed 10/20/89; Excerpts 71-96.)

WWP believes that, while the Tribe is entitled to seek review of the determination that its motion was moot, it is not appropriate to seek review of an issue never decided on the merits below. This is a question of this Court's appellate jurisdiction.

This Court's jurisdiction is appellate, not original. See 28 U.S.C. § 2106 (this Court may modify, affirm, etc. "any... order of a court lawfully brought before it for review"); 28 U.S.C. § 1291 (appellate court has "jurisdiction of appeals from all final decisions of district courts"). The "final decision" from which the Tribe has taken the present

appeal[26] is the Order certified as final by the trial court. (CR 155, order dated 6/5/90.)

WWP believes that, once the district court granted WWP's motion, the trial court had no subject matter jurisdiction to determine the Tribe's motion. U.S. Constitution, art. III. That determination is subject to review herein, but the Tribe's motion itself, which has never been decided, is not subject to "review."

If this Court reverses the district court's order granting summary judgment to

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[26] The procedural history of this Appeal is confusing, at minimum, and WWP has strong doubts as to the timeliness of this appeal and the Tribe's Statement of jurisdictional basis therefor. While the tribe claims that this is a 28 U.S.C. § 1291 appeal, Brief of Appellant, at p. 1, the Tribe also moved for certification of "no just reason for delay," indicating a 28 U.S.C. § 1292 appeal. (CR 147, motion dated 4/16/90.) This motion was denied. CR 155, Order dated 6/5/90. The notice of appeal was filed many months later. (CR 188, notice filed 10/12/90.)

WWP, then, if the Tribe presents its motion again on remand, the district court can rule on the merits. Until the district court rules on the merits, however, there is nothing for this Court to review. Accordingly, the Tribe's argument on this issue is not a proper subject for this Court to review at this time.

As the United States Supreme Court held in Singleton v. Wulff, 428 U.S. 106 (1976), an appellate court should not resolve issues on which the trial court has passed, except in exceptional circumstances, as where the matter is undisputed or indisputable. This is not one of those circumstances.

E. THE TRIBE'S MOTION LACKED MERIT BELOW, AND SHOULD BE DENIED HERE.

The Tribe did not file a statement of facts or memorandum in support of its motion for summary judgment. It is thus difficult to determine what issues the

Tribe sought to present to the trial court. It appears that the Tribe is raising three bases for such motion here. This Court should not address them. See, e.g., Michael-Regan Co., Inc. v. Lindell, 527 F.2d 653 (9th Cir. 1975).

Under Fed.R.Civ.P. 56, the Tribe may only obtain a summary judgment if there are no genuine issues of material fact. However, there are genuine issues of material fact with respect tc whether the Tribe ever had title to the property at issue and whether such property is within an Indian reservation and whether there has been extinguishment of Indian title with respect to the Little Falls hydro-electric development.

For example, the Exhibits attached to the first Robert D. Dellwo Affidavit, CR 76, particularly Exhibit 22 at p. 1 and Exhibit 39 at p. 2, the special Indian allotting agent who was charged with the

duty of determining which lands could be allotted to individual Indians (Mr. Clair Hunt), concluded that the land which had been previously granted to David Wilson and WWP was not available for allotment. Therefore, according to Mr. Clair Hunt's letters, the boundary of the allotments adjoining the lands granted to WWP and Wilson was, in fact, the boundary of such Wilson and WWP lands. Such allotments do not include WWP's lands.

In addition to the foregoing, there is and was no evidence that Congress ever specifically authorized and established the Spokane Indian Reservation, prior to 1905. In Sioux Tribe of Indians v. United States, 316 U.S 317, 326 (1942), the Court held that Congress has the exclusive authority to dispose of public lands under Article IV, § 3 of the United States Constitution. Absent a treaty which established the reservation or an Act of

Congress which established the reservation, the Tribe never had any compensatory interest in the lands of the Executive Order Reservation. Id., 316 U.S. at 326.

Therefore, it should be considered that when Congress authorized the construction of dams and the disposition or disposal of the land along the Spokane River under the Act of March 3, 1905, Congress must have intended to extinguish any Indian title or claim with respect to that property. See Sioux Tribe of Indians v. U.S., supra.

In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977), the Court made clear that Congress has the authority to abrogate any Indian claim to property. It is also clear from the Rosebud case that when the actions of the Federal Government are being construed to determine whether or not an extinguishment has occurred, the

Court is not limited to looking at the language of any act of Congress, but is rather required to look at all of the facts and circumstances to determine the intent of Congress and the Government. Id. at 594-598.

Indeed, the court may consider how the government has treated the property at issue and whether or not the state has exercised authority over the property at issue. Id. at 604. Under the holding of the Court in Rosebud, it is clearly inappropriate for the court to enter a summary judgment on the issue of extinguishment without having the full record before it, particularly, as is shown here, where it is undisputed that Congress never actually authorized the establishment of the Spokane Indian Reservation and where Congress authorized the sale of land to WWP and Wilson.

The cases cited by the Tribe in the Brief of Appellant do not support its contentions herein. Those cases all involved Indian reservations which were established by treaty or pursuant to Act of Congress.

None of the cases cited by the Tribe involve a case where an Indian reservation was established by an Executive Order and where there had not been any specific authority from Congress for the issuance of such Executive Order. As pointed out previously, the claim of the Tribe herein involves the respective rights between the Tribe and WWP and the State of Washington, vis-a-vis the Spokane River at the site where the Little Falls hydro-electric development is constructed, and involves a claim for damages against WWP in connection with the construction of the Little Falls hydro-electric development.

(See the Tribe's Complaint, CR 1, Supp.Excerpts 447)

However, in its Memorandum filed on September 26, 1989, at p. 4, L. 22, the Tribe is arguing that it brought this action "to finally resolve ongoing jurisdictional and ownership disputes, and to quiet once and for all the Tribe's continuing title to the bed and north bank of the Spokane River where it forms the south boundary of the Reservation, and to establish the continuing right of its members to access and use the river and reservoir for fishing, aesthetic and recreation purposes, and for any other use consistent with the purposes for which the Reservation was formed." CR 73.

On p. 8 of its Memorandum, commencing at L. 7, the Tribe states that "the questions of 'extinguishment' of the Tribe's title and 'diminishment' of the Reservation boundaries are therefore the

substantive and pivotal issues to be decided by this Court." CR 73. As between WWP and the Tribe, the "extinguishment" need not be decided in this case. WWP claims that as between WWP and the Tribe, the ownership issues have previously been decided in WWP v. FERC, 775 F.2d 305, 336 (D.C. Cir. 1985).

A determination with respect to "extinguishment," "diminishment," or "jurisdiction" is not necessary in this case. However, the determination of the Court in this case could possibly have an impact on those matters, and the law with respect to such matters will be discussed below.

On March 3, 1905, Congress enacted the statute which specifically authorized the acquisition of lands and the construction of water power developments on the Spokane River along the southern boundary of the Spokane Indian

Reservation. It has ultimately been determined by Interior, and the United States Court of Appeals for the District of Columbia that when Interior approved the applications made by David Wilson and WWP, the effect of such actions by Interior was to grant all of the right, title and interest necessary for the construction, operation and maintenance of the Little Falls hydro-electric development. WWP v. FERC, supra.

It should also be noted that there is no Congressional delegation of authority or no act of Congress which provides for the grant or conveyance of the bed of the Spokane River to the Spokane Indians. As will be shown later, depending on the assumptions, this may be of some significance.

None of the cases cited by the Tribe with respect to "extinguishment" or "diminishment" involve an Executive Order

reservation which was never authorized by Congress prior to the sale of land under federal law, nor do such cases involve an act of Congress which specifically authorizes the grant of lands for the purpose of constructing water power projects. The following is a brief discussion of each of the cases cited by the Tribe in its briefing below, and to this Court.

Shoshone Tribe v. United States, 299 U.S. 476 (1937). This case involves the Wind River Reservation which was established by treaty. The case involved a suit in the Court of Claims for alleged breach of treaty rights and involved the jurisdiction of a special act of Congress authorizing such a claim. Id. at 484-485. The treaty specifically stated that the Reservation was "set apart for the absolute and undisturbed use and occupancy of the Shoshone Indians . . . and such

other friendly tribes or individual Indians as from time to time they [Shoshone Indians] may be willing, with the consent of the United States, to admit amongst them." (Emphasis added.) Id. at 485-486. The Court took special note of the:

> solemn pledge of faith by the United States that no persons, except a few specially enumerated, and government agents engaged in the discharge of duties enjoined by law, should 'ever be permitted to pass over, settle upon, or reside' in the territory so reserved.

Id. at 486.

After the treaty reservation was established for the Shoshone Indians, the Government located a large group of Northern Arapahoe Indians on the Wind River Reservation. The Shoshone Indians protested. However, the Government persisted in its actions and gave the Northern Arapahoe Indians equal rights on

the Reservation. Id. at 486-490. Under such circumstances, the Court held that the United States Government has title to the land and that the United States, effectively, granted rights in the Wind River Reservation to the Northern Arapahoe Indians. The Court then held that such action by the United States Government constituted a "taking" and that the Shoshone Indians were entitled to compensation. Id. at 496.

The Shoshone Tribe v. U.S. case does support the concept that where the Government has taken property in a treaty reservation, then such taking is valid and the Tribe is entitled to compensation. The Shoshone Tribe v. U.S. case is distinguishable from the Spokane Tribe case in that the reservation at issue was a treaty reservation and not an Executive Order reservation. However, it is clear that where Congress has authorized a

taking, such taking is lawful. The only remedy for the Tribe was a claim before the Court of Claims which was specifically authorized by Congress.

Solem v. Bartlett, 465 U.S. 463 (1984). The Solem case involved a question of the criminal jurisdiction of a state court in connection with a rape committed by an Indian on land in an Indian reservation. The question was whether or not the place where the rape occurred was "Indian country" as defined in 18 U.S.C. § 1151.

Generally, the case has no relevancy to the issues before this Court. However, the case did discuss whether or not the Indian reservation in that case had been diminished. The Indian reservation had been established by Act of Congress. Id. at 465. The reservation was opened for settlement under a 1908 statute. Id. at 467. There was substantial discussion of

the fact that the policy of the United States Government with respect to Indians was a policy of assimilation and that reservations were expected to be things of the past. Id. at 467-468.

The court also discussed the fact that whether or not an Indian reservation has been diminished does not depend solely on whether or not there is explicit language in the statute. Rather, the court should look at all of the circumstances and the contemporaneous understandings. Where an area has lost its Indian character and where the area involved has been acknowledged as not being part of the reservation and has not been treated as part of the reservation, such diminishment may be de facto, if not de jure. Id. at 471. In the Solem case, there was evidence that there was a strong tribal presence, there were few homesteads perfected in the area, the population consisted of a high

percentage of tribal members. Under that circumstance, the court held that, for the purposes of 18 U.S.C. § 1151, the area where the rape occurred was considered to be "Indian country."

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). In Rosebud, the court was considering a claim of the Indian tribe for declaratory judgment. The reservation at issue was created by treaty and by act of Congress. Id. at 585, 589. Several Congressional acts authorized the disposal of all unallotted land. In Rosebud, the power of Congress to abrogate treaty rights was specifically acknowledged. Id. at 594. The court also noted that there is no particular statement that must be made by Congress to accomplish the disestablishment of an Indian reservation. Id. at 597.

Indeed, the court noted that any Congressional act enacted after the

decision of the court in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), must be construed in light of the holding of the Lone Wolf court. Id. at 598. The court seemed to give particular emphasis to the fact that neither Congress nor the Department of Indian Affairs ever sought to exercise its authority over the area at issue or to challenge the state's exercise of authority over that area. Id. at 604.

The court also noted that if the Government took allotments from the Indians, other allotments would be granted and that there was a strong indication of a continuing interest in disestablishing the reservation in the affected area. Id. at 613.

It should also be noted that in Lone Wolf, the court stated, with respect to property claimed by Indians, Congress has absolute power. Lone Wolf, at 565-568. In Lone Wolf, the court stated:

> In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indians' tribal property, the property of those who, as we have held, were in substantial effect the wards of the Government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts. The legislation in question was constitutional, and the demurrer was therefore rightly sustained.

Lone Wolf supports the claim of WWP. Here, Congress specifically authorized the granting of lands along the Spokane River for the construction of a water power

project when Congress enacted the Act of March 3, 1905. WWP constructed such a project which was clearly contemplated and authorized by Congress. If the Tribe has suffered any damage by virtue of such grant made by the United States and such authority granted by the United States, the only remedy for the Tribe was against the United States. Furthermore, in order for the Tribe to obtain such a remedy against the United States, Congress would be required to authorize litigation for such a remedy. Of course, Congress did authorize the making of such a claim by the Tribe against the United States when Congress enacted the Indian Claims Commission Act in 1946. 25 U.S.C. § 70a, et seq. Since the claim arose prior to 1946 and since the Tribe either made and recovered for such a claim or neglected to make such a claim, such claim is now barred under the Indian Claims Commission

Act. 25 U.S.C. § 70u. It seems clear in this case that the lands granted to David Wilson and WWP were no longer considered to be necessary in the Spokane Indian Reservation. That is the reason Congress authorized such grant. Such conclusion is also consistent with the policy of the United States Government and the Tribe which was for the Spokane Indians to adopt the ways of the non-Indians and to begin farming.

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985). The Oneida case involved a suit by the Oneida Indians to recover land which had been granted by the Indians to the State of New York without approval of Congress as required under the Trade and Intercourse Act of 1793. Id. at 229. The Oneida case did not involve the granting of land under specific authority of an act of Congress. Furthermore, some of the language used in

the case appears to be inconsistent with the language of the court used in the Rosebud case. In the Oneida case, there was not only an absence of plain and unambiguous language authorizing the granting of lands, but there was no act of Congress which authorized the grant. In the case before this Court, the Tribe was never involved in the grant of rights made by the United States to David Wilson and WWP. Rather, the granting of such rights was specifically authorized by Congress and was expressly made by the actions of Interior as authorized by Congress. The Oneida case does not have any application to the facts in this case.

Washington v. Fishing Vessel Ass'n, 443 U.S. 468 (1979). This Fishing Vessel case deals with the relative rights of Indians and non-Indians with respect to salmon fishing. The case deals with several Indian treaties which were duly

ratified by the Senate and which contained specific language providing Indians with:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory ....

Such language appeared in many Indian treaties. The language is included in the treaty under consideration in United States v. Winans, 198 U.S. 371, 377-378 (1905) and in Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392 (1968) and in many other cases. In Winans, supra, the Court was construing an Indian treaty which provided:

> All of which tract shall be set apart, and so far as necessary, surveyed and marked out, for the exclusive use and benefit of said Confederated Tribes and Bands of Indians as an Indian Reservation; nor shall any white man, excepting those in the employment of the Indian Department be permitted to reside upon said Reservation .... (Emphasis added.)

It is clear from the Indian treaties which have been construed by the United States Supreme Court that if the setting aside of a fishery for the benefit of the Indians is intended, the United States Government used specific language to show such intent. For example, in Winans, the treaty at issue specifically authorized the President of the United States to set aside an area six miles square at the confluence of two rivers for the specific purpose of providing a fishery for the Yakima Indians. Winans, supra, at 378. No similar provision appears anywhere in connection with the Tribe. Furthermore, it is of particular importance to note that no Congressional action ever approved the setting aside of the Spokane River as a fishery or for the exclusive use of the Spokane Indians. Indeed, the language of the 1881 Executive Order does not even contain words which indicate that the

Spokane Indian Reservation was intended to be for the "exclusive use and benefit" of the Spokane Indians.

Menominee Tribe v. United States, 391 U.S. 404 (1968). The Menominee case involves an 1854 treaty. Id. at 405. The case involves a claim before the United States Court of Claims whereby the Menominee Tribe was making a monetary claim for the taking of fishing and hunting rights from the Tribe by virtue of a Termination Act. The history of the treaty is set forth in Menominee Tribe of Indians v. United States, 179 Ct.Cl. 496, 388 F.2d 998, 1001-1002 (1967). The United States Court of Claims held that the treaty language which states that the United States "agrees to give, and do hereby give, to said Indians ..." certain lands which were "to be held as Indian lands are held" was intended to include all hunting and fishing rights within

those lands. Id. at 1002 and 391 U.S. at 406.

The United States Supreme Court also took note of the fact that the Solicitor General compared the treaty of Wolf Creek for the Menominee Tribe with language used in other treaties to reach the same conclusion. It should also be noted that the Wisconsin Supreme Court had previously reached the same conclusion that the Menominee Tribe held all hunting and fishing rights in the treaty Indian reservation. Id. Under these circumstances, the Menominee Treaty at Wolf Creek can be compared with the treaty discussed in Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970). Where there is a treaty or Act of Congress which appears to grant specified lands to Indians for their exclusive use, the Indians are generally deemed to own such lands and any

diminution of Indian rights or any taking of such rights or lands must be clearly intended and compensated.

Again, however, the circumstances considered in the Menominee cases do not, in any way reflect, the circumstances considered herein. Here, there is no treaty and there is no Congressional recognition or provision for rights in the Spokane River or for a fishery in the Spokane River. Indeed, it is obvious that under the Act of March 3, 1905, Congress intended to provide for the granting of rights so that water power projects could be constructed on the Spokane River. Congress intended to remove any impediments with respect to the construction of such projects under the 1905 Act.

In addition, Dellwo Exhibit No. 6 at pp. 2 and 3, and Exhibit 7 at pp. 7 and 8 clearly show that the local Indian agent

and the Commissioner of Indian Affairs both knew that the construction of the proposed project would dam the Spokane River and would destroy any fishery that may have existed in the Spokane River. Yet, the Indian agent and the Commissioner of Indian Affairs expressly approved the application and expressly recommended that Interior approve the application filed by David Wilson which provided for the construction of a water power project. From all of this, it is clear that neither the President or the Congress or Interior ever provided for, or intended to provide for, or ever recognized Indian ownership of the Spokane River or any fishery in the Spokane River.

Mattz v. Arnett, 412 U.S. 481 (1973). Mattz arose from the confiscation of fish nets by California. The Indian reservation at issue was established by an 1855 Executive Order which was specifically

authorized by an Act of Congress. The issue was whether or not the activities of an Indian in the Klamath River occurred in "Indian country" as that term is defined under 18 U.S.C. § 1151. It should also be noted that an 1864 Act of Congress provided for setting aside additional tracts by the President. Furthermore, an 1891 Executive Order was issued arguably pursuant to the 1864 Act, which Executive Order enlarged the reservation to include the original Klamath Indian Reservation. Id. at 493. By an 1892 Act, the Hoopa Valley Reservation, which included the original Klamath Indian Reservation, was opened to homesteading with the proceeds to be placed in a fund to be used for the benefit of the Indians. Id. at 495. Finally, in 1958, certain lands which were not acquired under the homestead laws, were returned to the Indians. Id. at 496, fn. 17. The 1892 Act provided for

allotment of the Indian Reservation under the Dawes Act of 1887 and then provided for the homesteading of the remaining unallotted lands with the funds to go to the Indians. Id. at 502. Under all of these circumstances, the Court concluded that the Hoopa Indian Reservation had not been terminated or diminished. However, Mattz is not analogous to the Spokane Tribe case.

In Mattz, the Court was considering an Indian reservation established pursuant to Act of Congress. It is clear that under such circumstances, the Indians had a compensable interest in the lands. Here, the Spokane Indian Reservation was set forth in an 1881 Executive Order which was never approved or ratified by Congress. The Tribe never had a compensable interest in the lands described in the 1881 Executive Order. Sioux Tribe of Indians v. United States, 316 U.S. 317, 326 (1942).

There is no public policy reason to recognize any Indian interest in the Spokane River and lands associated with the Little Falls hydro-electric development. There has been no Presidential or Congressional recognition of the Tribe's claim to the Spokane River or any fishery in the Spokane River. Rather, Congress has authorized and Interior has approved and granted lands and rights necessary for the construction, operation and maintenance of the Little Falls hydro-electric development.

It should also be noted that if it is assumed that the Spokane River is navigable, as has sometimes been alleged by the Tribe under the holding of Montana v. United States, 450 U.S. 544 (1981), there must be some expressed intent under some treaty prior to 1871, or under some Act of Congress before it can be determined that a navigable river was

conveyed to the Tribe. There is a very strong presumption against such a conveyance.

Certainly, under the holding of Sioux Tribe v. United States, supra, without an Act of Congress, or without a treaty which expressly provides for such a conveyance, it cannot be assumed or determined that such a conveyance of a navigable water ever occurred. A description as set forth in the 1881 Executive Order cannot amount to a conveyance or recognition in the Tribe of any interest in the Spokane River or any alleged fishery in the Spokane River.

The foregoing notwithstanding, does the Act of March 3, 1905, recognize some interest in the Tribe in the Spokane River? The answer is clearly no. The Act of March 3, 1905, taken together with the compensation provisions of the Act of March 2, 1899, clearly provide that a

water appropriator under Washington law can acquire whatever rights and lands are necessary for the construction, operation and maintenance of a water power development on the Spokane River by complying with Washington law and by making an application to Interior in compliance with all applicable regulations, and by paying the amounts determined to be due by Interior. The record here and the record before the Court in WWP v. FERC, 775 F.2d 305 (D.C.Cir. 1985) clearly shows that David Wilson and WWP complied with all laws and regulations and paid all sums due under the Act of March 3, 1905, and acquired all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls hydro-electric development. (See the patent attached to the Affidavit of Jerry K. Boyd dated October 19, 1989.)

It should be noted that although it was clearly contemplated that a dam would be built on the Spokane River, there was no provision in the 1905 Act for compensating the Spokane Indians with respect to the Spokane River and any fishery alleged to be in such Spokane River. It is obvious from all of the treaties and statutes referred to in all of the various cases cited by the Tribe in its Memorandum, that if the Tribe had any recognized interest in the Spokane River and if the Tribe had any fishery which was recognized in the Spokane River, the United States Government and Congress would have either protected such right or provided for compensation.

The clear implication from the lack of any provision expressly protecting the Spokane River or any fishery alleged to be in the Spokane River is that neither Congress nor the President nor any other

authorized person of the United States Government ever acknowledged or recognized that the Tribe ever held any interest in the Spokane River or in any fishery alleged to be in the Spokane River.

It is also clear that the Tribe cannot exercise jurisdiction over the Little Falls hydro-electric development. Montana v. United States, supra at 561-563; and Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. ___, 106 L.Ed.2d 343, 359, 374 (1989). Under these circumstances, particularly where this project was specifically authorized by Congress, and is either not a part of the reservation or, at most, is on the southernmost edge of the reservation, and where, in order to access the project, there is no need to make any contact with the reservation whatever since there is a road or highway which crosses the Spokane River from the

south within land owned by WWP, there is no reason for the Tribe to exercise any jurisdiction whatever over the project. This fact should not be overlooked when the Court is considering whether or not the 1881 Executive Order Indian Reservation includes the Little Falls hydro-electric development. There can be no doubt that if this Court concludes that the issue of extinguishment or diminishment is before this Court in this matter and if the Court concludes that the Little Falls hydro-electric development is within the Spokane Indian Reservation, the Tribe will then argue in the Indian tax case that such inclusion within the Spokane Indian Reservation authorizes the Tribe to impose a very large business and occupation tax on WWP with respect to such project.

IV. CONCLUSION

Appellee Washington Water Power Company believes that the trial court was correct in dismissing this action on the stated ground of collateral estoppel. Other reasons to affirm such dismissal are advanced in this Brief.

If this Court affirms, the request by the Tribe for judgment in its favor remains moot. However, even if this Court reverses, there is no basis for granting judgment to the Tribe. Material fact questions preclude summary judgment, the Tribe's assertions of law are incorrect, and, finally, this Court should not "review" matters never decided below.

DATED this __ day of _____, 1991.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By_____
Jerry K. Boyd
Milton G. Rowland
Attorneys for defendant/appellee
Washington Water Power Company

92-546

NO. _____

Supreme Court, U.S.
FILED
SEP 25 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

The Washington Water Power Company,

Petitioner,

v.

Spokane Indian Tribe,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Docket No. 91-35000
VOLUME II

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TABLE OF CONTENTS
Volume II

Page

APPELLEE WASHINGTON WATER POWER COMPANY'S INDEX TO SUPPLEMENTAL EXCERPTS OF RECORD BEFORE THE NINTH CIRCUIT COURT OF APPEALS . 260a

VOLUME I 261a
VOLUME II 264a

STATEMENT OF FACTS IN SUPPORT OF WWP'S MOTION FOR SUMMARY JUDGMENT BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, EQUITABLE ESTOPPEL OR ESTOPPEL BY DEED, AND LACHES (United States District Court for the Eastern District of Washington, dated October 6, 1989) 268a

PLAINTIFF'S OBJECTION TO DEFENDANT TWWPCO'S STATEMENT OF FACTS IN SUPPORT OF DEFENDANT'S SECOND SUMMARY JUDGMENT MOTION (United States District Court for the Eastern District of Washington, dated October 19, 1989) 276a

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DISMISSAL OF THE CLAIMS OF THE TRIBE BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, AND LACHES (United States District Court for the Eastern District of Washington, dated October 6, 1989) 282a

WWP'S LR 56 STATEMENT OF FACTS IN REPLY (United States District Court for the Eastern District of Washington,dated October 26, 1989) 304a

PETITION IN INTERVENTION (Before the Federal Power Commission, Washington, D.C., dated February 5, 1971) 309a

PATENT RECORD, STEVENS COUNTY WASHINGTON (Dated July 2, 1924) . 330a

ORDER CALLING FOR THE FILING OF MEMORANDA (Before the Federal Energy Regulatory Commission, dated March 22, 1978) 342a

Washington Water Power Company, Project No. 2545, 11 FERC ¶ 63,001 (pp. 65,001-et seq.) (1980) . . . 345a

The Washington Water Power Company, Project No. 2545, FERC Opinion No. 117, 15 FERC ¶ 61,039 (pp. 61,064-et seq.) (1981) . . . 417a

NO. 91-35000

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SPOKANE TRIBE OF INDIANS,
Plaintiff/Appellant,
vs.
STATE OF WASHINGTON,
Defendant,

and

WASHINGTON WATER POWER COMPANY,
Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF WASHINGTON
NO. CV-82-00753 AAM

APPELLEE WASHINGTON WATER POWER COMPANY'S SUPPLEMENTAL EXCERPTS OF RECORD VOLS. I AND II

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INDEX

SUPPLEMENTAL EXCERPTS OF RECORD

VOL. I

U.S. District Court No. C-82-753AAM

Doc.	Date	Description	Page
1.	9/13/89	AFFIDAVIT OF JERRY K. BOYD DATED SEPTEMBER 13, 1989	1
		ATTACHMENTS	
		-Petition in Intervention	5
		-Land grant issued July 2, 1924, signed by Hubert Work, Secretary of the Interior	14
		-Supplemental and Second Amended Answer of the Wash. Water Power Company and Counterclaim for Declaratory Judgment .	20
		-Status Certificate Submitted by the Wash. Water Power Company	30
		-Affidavit of Personal Service . . .	40
		-Affidavit of Mailing	41

2.	10/3/89	AFFIDAVIT OF JERRY K. BOYD	43
		ATTACHMENTS	
		-Report on navigability of Spokane River, Washington and Idaho) (April 29, 1932) . . .	47
		-Executive Document No. 63 (Jan. 9, 1988)	52
		-Senate Document No. 719, Indian Affairs: Laws and Treaties, vol. III, compiled to December 1, 1913 . . .	94
		-Government Printing Office 1904, Indian Affairs: Laws and Treaties, vol. I, compiled to December 1, 1902	120
		-Affidavit of Mailing	144
		-Affidavit of Service by Mailing and Messenger	146
3.	10/4/89	FACTS RELIED UPON BY WWP IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT	148
4.	10/6/89	MOTION FOR SUMMARY JUDGMENT OF DISMISSAL OF THE CLAIMS OF THE TRIBE BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, AND LACHES	156

5.	10/6/89	STATEMENT OF FACTS IN SUPPORT OF WWP'S MOTION FOR SUMMARY JUDGMENT BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, EQUITABLE ESTOPPEL OR ESTOPPEL BY DEED, AND LACHES	158
6.	10/6/89	AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 6, 1989	162
		ATTACHMENTS	
		-Petition In Intervention	168
		-Petition of the Secretary of the Interior for Leave to Intervene	177
		-Amended Petition of the Spokane Tribe of Indians, Indian Claims Commission No. 331 (undated)	191
7.	Filed 10/16/89	PLAINTIFF SPOKANE TRIBE OF INDIANS' RESPONSE TO TWWPCO'S LR 56 STATEMENT OF FACTS	200

INDEX

SUPPLEMENTAL EXCERPTS OF RECORD

VOL. II

U.S. District Court No. C-82-753AAM

Doc.	Date	Description	Page
8.	10/26/89	AFFIDAVIT OF JERRY DATED OCTOBER 25, 1989	204
		ATTACHMENTS	
		-Defendant, The Washington Water Power Company's First Requests for Admission to Plaintiff	211
		-Order Calling for the Filing of Memoranda, Federal Energy Regulatory Commission Project No. 2545, March 22, 1978	229
		-Memorandum, Federal Energy Regulatory Commission Project No. 2545, undated, Certificate of Service dated April 28, 1978	231
		-Memorandum of The Washington Water Power Company in Response to Order dated March 22, 1978, undated, served May 1, 1978	239

-Legal Memorandum of Intervenor Tribes Spokane and Coeur d'Alene, undated, . served May 2, 1978 . . 273
-Reply Brief of Commission Staff Counsel, Federal Energy Regulatory Commission Project 2545, dated October 22, 1979 . . . 292
-Presiding Administrative Law Judge's Initial Decision Determining Commission Jurisdiction Over Hydroelectric Development, Federal Energy Regulatory Commission Project No. 2545, dated March 26, 1979 312
-Presiding Administrative Law Judge's Order Setting Hearing Dates, Federal Energy Regulatory Commission Docket No. P-2545, dated March 26, 1979 344
-Brief of Spokane Indian Tribe, Federal Energy Regulatory Commission Project No. 2545, dated September 17, 1979 . . 345

9. 10/26/89 WWP'S LR 56 STATEMENT OF FACTS IN REPLY 432

10.	10/19/89	AFFIDAVIT OF JERRY K. BOYD DATED OCTOBER 19, 1989 . . .	437
11.	10/13/82	COMPLAINT	447
12.	10/25/89	FEDERAL ENERGY REGULATORY COMMISSION OPINION NO. 117 (Submitted below with the Affidavit of Jerry K. Boyd dated October 25, 1989, Supplemental Excerpts of Record pp. 204ff) .	460
13.	10/25/89	FEDERAL ENERGY REGULATORY COMMISSION OPINION NO. 117-A (Submitted below with the Affidavit of Jerry K. Boyd dated October 25, 1989, Supplemental Excerpts of Record pp. 204ff) .	477
14.	9/20/90	MOTION TO ALTER OR AMEND THE JUDGMENT ENTERED ON SEPTEMBER 14, 1990	527
15.	9/20/90	AFFIDAVIT OF JERRY K. BOYD DATED SEPTEMBER 20, 1990 . .	530
16.	10/12/90	ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT	534

17. 12/27/84 MOTION TO STRIKE
HEARING ON WWP MOTION
FOR PARTIAL SUMMARY
JUDGMENT 536

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	STATEMENT OF FACTS IN
v.	)	SUPPORT OF WWP'S
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	MOTION FOR SUMMARY JUDGMENT BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, EQUITABLE ESTOPPEL OR ESTOPPEL BY DEED, AND LACHES
Defendant.	)	

The Washington Water Power Company (WWP), by and through its undersigned

attorneys, submits the following separate Statement of Facts pursuant to Local Rule LR 56 in support of WWP's Motion for Summary Judgment of Dismissal of the claims of The Spokane Tribe of Indians (Tribe) against WWP with prejudice based on the application of statutes of limitation, and the Doctrines of Res Judicata, Collateral Estoppel, Estoppel by Deed, and Laches.

1. There is no evidence that Congress ever intended to grant, convey, or reserve the Spokane River in the vicinity of Little Falls for the use of the Tribe.

2. Congress authorized the granting of all property rights necessary or appropriate for the construction, operation, and maintenance of hydroelectric developments on the Spokane River in the vicinity of the Spokane Indian Reservation and David Wilson and

WWP complied with all laws and regulations and made all payments and were granted all rights, title, and interest necessary for the construction, operation, and maintenance of the Little Falls Hydroelectric Development on the Spokane River by the United States. (WWP Request for Admissions, Doc. M, and Dellwo Affidavit, Doc. No. 46.)

3. WWP constructed the Little Falls Hydroelectric Development from 1908 to 1911 at a cost in excess of $1.5 million in reliance upon the rights acquired by David Wilson and WWP from the United States and has continuously operated and maintained the Little Falls Hydroelectric Development since 1911 to produce electrical power which is sold and distributed to WWP's customers. (Olson Affidavit.)

4. At the time WWP constructed the Little Falls Hydroelectric Development

from 1908 to 1911, the United States and its agents and representatives knew that said project included a dam in the river and intended that the project include a dam in the Spokane River and knew that whatever effect the dam would have on the river and any fishery in the river would occur and did occur. All actions taken by WWP with respect to the construction, operation, and maintenance of the Little Falls Hydroelectric Development were authorized by the Act of March 3, 1905 (33 Stat. 1006) and the regulations promulgated thereunder, and were made with the concurrence and consent of the Secretary of the Interior, the Commissioner of Indian Affairs, and the Indian agents who had jurisdiction over the Spokane Indian Reservation.

5. On or about February 5, 1971, The Spokane Tribe of Indians filed a Petition to Intervene before the Federal

Power Commission and served a copy on Alan P. O'Kelly, a retired partner of the undersigned attorneys. (A copy of the Petition is attached to the Affidavit of Jerry K. Boyd dated October 6, 1989.) In that Petition to Intervene, the Spokane Tribe of Indians claimed that the Federal Power Commission had jurisdiction to decide the property rights of WWP and to provide for the payment of compensation to the Tribe for all damages claimed to have arisen from the construction, operation, and maintenance of the Little Falls Hydroelectric Development. (Id.) WWP claimed that the Federal Power Commission, which later became the Federal Energy Regulatory Commission (FERC), had no jurisdiction to determine the property rights of WWP. At the request of the Spokane Tribe of Indians (through its attorney, Robert D. Dellwo) and the Secretary of the Interior on behalf of the

Tribe, FERC took jurisdiction over the subject matter, held evidentiary hearings at which time all parties had an opportunity to present whatever testimony they thought relevant to the claims made by the Tribe, and made various findings and conclusions. (Affidavit of Jerry K. Boyd dated October 6, 1989) WWP sought judicial review of the findings and conclusions made by the FERC. The FERC was reversed and, based upon the record which included the same documents presented to this Court by the Tribe, determined, as a matter of law, that WWP acquired all rights, title, and interest necessary for the construction, operation, and maintenance of the Little Falls Hydroelectric Development from the United States under the Act of March 3, 1905, and the regulations promulgated thereunder. (Washington Water Power Co. v. Federal

Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985))

6. Any employees of the Washington Water Power Company who were involved in the construction and the initial operation of the Little Falls Hydroelectric Development are long since deceased. Due to the passage of approximately 80 years since the construction of the Little Falls Hydroelectric Development, the ability of WWP to find witnesses or documents which may have supported a defense of WWP against the claims made by the Spokane Tribe, particularly as such claims relate to any fishery that may have existed at Little Falls and the effect of the construction of the Little Falls Hydroelectric Development on such fishery, has been severely prejudiced. There is no practical way to avoid such prejudice.

7. The Spokane Tribe of Indians either made or could have made a claim

against the United States under the Indian Claims Commission Act of 1946 (60 Stat. 1049, et seq.) for all losses or damages or all adverse effects incurred by the Spokane Tribe which may have arisen out of the construction, operation, and maintenance of the Little Falls Hydroelectric Development under and in accordance with the Act of March 3, 1905, as administered by the Secretary of the Interior and the Department of the Interior. The Spokane Tribe of Indians either made such a claim and were duly compensated for such claim before the Indian Claims Commission under Docket No. 331 or failed to make such claim.

DATED this 6th day of October, 1989.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	PLAINTIFF'S OBJECTION TO DEFENDANT TWWPCO'S STATEMENT OF FACTS IN SUPPORT OF DEFENDANT'S SECOND SUMMARY JUDGMENT MOTION
v.	)	
STATE OF WASHINGTON; and WASHINGTON WATER POWER COMPANY CO.,	)	
Defendants.	)	

THE PLAINTIFF, SPOKANE TRIBE OF INDIANS, a federally recognized Tribe, by its undersigned attorneys, does object and controvert the facts set forth by TWWPCO in its Statement of Facts. The basis for such objection is as follows:

I.

There is substantial evidence that congress did intend to grant, convey and reserve the Spokane River in the vicinity of the Little Falls for the use of the Tribe. (Affidavit of Fahey, September 26, 1989, paragraphs 7, 8, 9, 11 and 12, Exhibits 3-10).

II.

There is substantial disagreement as to what Wilson and TWWPCO obtained under the Act of March 3, 1905 and whether TWWPCO made all payments required. (Affidavit of Fahey, September 26, 1989, paragraph 22, Exhibits 14 and 15). The documents relied upon by TWWPCO for the facts set forth in paragraph 2 do not address any property rights. (TWWPCO Requests for Admissions document M and Dellwo Affidavit, document 46).

III.

There is nothing in the Olsen Affidavit referred to as the justification for the statement in paragraph 3 to indicate that WWP was acting in reliance upon the rights acquired by David Olsen and WWP from the United States. In fact, there were a number of questions in the mind of the employee's and agents of TWWPCO as to what was actually obtained. (Affidavit of Fahey, September 26, 1989, paragraph 22, Exhibits 14 and 15).

IV.

Defendant TWWPCO has not offered any support for its statements in paragraph 4. The Plaintiff objects to these facts as they are not supported by any evidence.

V.

The Federal Energy Regulatory Commission did not consider matters set forth in the Tribe's petition to intervene. All that was determined in the

F.E.R.C. proceeding was that the Little Falls Dam facility was exempt from licensing under the Federal Power Act, and that F.E.R.C. had no jurisdiction to consider the Tribe's claims arising out of the wrongs committed by TWWPCO. (Affidavit of Dellwo in Support of Plaintiff's Motion to Strike Defenses and in Opposition to Defendant's Second Motion for Summary Judgment, Exhibit 1).

VI.

Plaintiff's object to the statement that TWWPCO has been severely prejudiced by this passage of time. In fact, TWWPCO knew from the beginning that there were overriding doubts as to what had been actually conveyed pursuant to the Act of March 3, 1905. It attempted to secure an unqualified patent to clarify its rights, but received instead, the ambiguous grant of 1924. It did nothing further to clarify its rights. Further, there is no evidence

in the record to support these statements. (Affidavit of Fahey, September 26, 1989, paragraph 22, Exhibits 14 and 15). In addition, Plaintiff believes TWWPCO has substantial files and records dated back to the turn of the century that have been utilized by TWWPCO in this proceeding and in the proceeding before F.E.R.C. without any prejudice.

VII.

The Spokane Tribe of Indians did not make any claim under the Indian Claims Commission Act of 1946 for losses, damages or adverse affects incurred by the Spokane Tribe which may have arisen out of the construction, operation and maintenance of the Little Falls hydroelectric system. With congressional approval, such a claim against the United States could still be filed. The Spokane Tribe was not compensated for any such claim before the Indian Claims Commission. The claims in

this proceeding are not claims which the Tribe could bring against the United States. 25 U.S.C. §2415 allowed this claim against TWWPCO to be filed after the year of 1982. This claim was properly brought within the dictates of that statute.

DATED this 19th day of October, 1989.

DELLWO, RUDOLF & SCHROEDER, P.S.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DISMISSAL OF THE CLAIMS OF THE TRIBE BASED ON STATUTES OF LIMITATIONS, RES JUDICATA, COLLATERAL ESTOPPEL, AND LACHES
v.	)	
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	
Defendant.	)	

The Washington Water Power Company (WWP), by and through its undersigned attorneys, submits the following

Memorandum of Authorities in support of its motion for an order dismissing the claims of the Spokane Tribe of Indians (Tribe) against WWP in this proceeding. WWP alleges that the claims made by the Spokane Tribe of Indians against WWP are barred by statutes of limitations, and the application of the doctrines of res judicata, collateral estoppel, estoppel by deed, and laches. The facts are shown in the statement of facts.

I. TRIBE'S CLAIM IS BARRED BY 25 U.S.C. 70(u).

In 1946, the United States Congress passed the Indian Claims Commission Act (60 Stat. 1049, et seq.). The Indian Claims Commission Act established the Indian Claims Commission to hear all claims the Tribe may have against the United States which arose prior to 1946. The claims were basically any claim on any basis. See 25 U.S.C.S. § 70(a)

(1983). The Tribe filed a claim before the Indian Claims Commission Act in Docket 331. That claim has been duly adjudicated, settled and compromised. 17 Ind. Claims Comm. 584-614. A final judgment was entered which provided for payment to the Tribe of $6,700,000. That final judgment was entered on February 21, 1967. Under the application of Section 22 of the 1946 Indians Claims Commission Act (25 U.S.C.S. § 70(u)), all claims that the Tribe either brought or could have brought are deemed finally adjudicated and all claims that the Tribe either brought or could have brought against the United States are now barred.

How does the statute apply in this case? WWP acquired its rights from the United States by Act of Congress dated March 3, 1905. The Secretary of the Interior approved applications of David Wilson and WWP for land and approved the

use of the lands on and along the Spokane River for the construction of the Little Falls Hydroelectric Development, which WWP finally constructed. Any claim that the Spokane Tribe was damaged or harmed in some way occurred as a result of a taking authorized by the Act of March 3, 1905. Under the Indians Claims Commission Act, the Tribe could have made any claim which they now attempt to make against the United States since it was the United States that authorized the construction of the Little Falls Hydroelectric Development. The Tribe either made such a claim or could have made such a claim. Regardless, any such claim against the United States is now barred by Section 22 of the Indian Claims Commission Act. See United States v. Dann, 470 U.S. 39, 105 S.Ct. 1058, 84 L.Ed.2d 28 (1985) (which reversed United States v. Dann, 706 F.2d 919 (9th Cir. 1983).

Any claim that the Tribe may have had with respect to the Spokane River must now be deemed to be extinguished by operation of the Act of March 3, 1905, and the grants made to David Wilson and WWP, and by operation of the Indian Claims Commission Act. See United States v. Dann, supra and United States v. Dann, 865 F.2d 1528, 1532-1536 (9th Cir. 1989). Therefore, the claim of the Tribe with respect to the Little Falls Hydroelectric Development is now barred and any title the Tribe may have had in the Spokane River has been extinguished.

II. THE TRIBE'S CLAIM IS BARRED BY 43 U.S.C.A. § 1166.

After the United States has issued a patent, the United States is barred from challenging such patent after six years from the date of issuance. 43 U.S.C.A. § 1166 (1986). The only exception is if the patent was issued due to fraud or

some other equitable ground. Here the land was granted by approval of applications and maps in 1905, 1906, and 1908, and the approval of joint surveys in 1910. Furthermore, a formal document in the nature of a patent was issued by the Secretary of the Interior in 1924. It is far too late for the United States to bring an action to challenge the patent issued to WWP .

Essentially, in this case, the Tribe is attempting to collaterally attack the patent and rights granted by the Secretary of the Interior pursuant to the Act of Congress of March 3, 1905. Under 43 U.S.C.A. § 1166, the United States could not bring such an action. Any claim of the Tribe to a compensable interest in the lands at issue must arise from some treaty of Act of Congress. Sioux Tribe of Indians v. United States, 316 U.S. 317, 326 (1942). Absent some congressional

conveyance, the Indians have no interest in the bed of the Spokane River. Id; United States v. Aam, 9th Cir. Slip Op. in Docket No. 88-3594, 9th Cir., October 2, 1989, at p. 8, 1989 Barkley's Law Publishers, 12191-12198. There is no showing in this case that there was any grant of the Spokane River to the Spokane Tribe by Congress.

After the issuance of the patent or the equivalent of a patent to David Wilson and WWP prior to 1925, not even the United States can challenge the rights acquired by WWP. Even if there was some conveyance by the United States after the conveyance and grant to David Wilson and WWP, such an attempt at conveyance by the United States would have been null and void and of no effect. Here, there is not once scintilla of evidence showing that Congress ever

authorized the conveyance of the Spokane River to the Tribe.

III. THE CLAIMS OF THE TRIBE ARE BARRED BY THE DOCTRINE OF RES JUDICATA.

Once a party puts an issue a right, question, or fact and such issue is determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). Here, the issue that the Court is being asked to determine is whether or not WWP has the rights, title and interests necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. That issue was presented to the United States Court of Appeals for the District of Columbia in Washington Water Power Co. v. F.E.R.C.,

775 F.2d 305 (D.C.Cir. 1985). In that case, the Tribe elected to present the issue to the Federal Power Commission which subsequently became the Federal Energy Regulatory Commission (FERC). Over the objection of WWP, the Tribe pursued the matter to its conclusion before the FERC. Full and fair and complete hearings were held at which time all parties had an opportunity to present all evidence. The United States Court of Appeals held against the Tribe and against the FERC, which is an agency of the United States, and held that WWP does own and possess all rights, title, and interests necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. Id. at 336. Such determination was made by the United States Court of Appeals after considering the full and entire record which had been made with the presentation of evidence

and arguments by the United States FERC staff, the United States Department of the Interior through its attorney on behalf of the Spokane Tribe of Indians, and the Spokane Tribe of Indians, through its own attorney, Robert D. Dellwo. The interests of the FERC and the Tribe on the issue of the rights, title and interests of WWP were the same. Both were attempting to establish that WWP did not own the rights, title and interests claimed by WWP. Attorneys for the FERC and attorneys for the Tribe filed briefs and presented oral argument before the United States Court of Appeals. The determination therein was adverse to the Tribe. The Tribe now wishes to relitigate the same issues presented to and decided by the United States Court of Appeals for the D.C. Circuit.

The purpose of the doctrine of res judicata is to avoid multiple lawsuits

and conserve judicial resources. Such purpose is served in this case by the application of the doctrine of res judicata to bar relitigation by the Tribe of the issues previously decided with respect to WWP's rights.

IV. THE CLAIMS OF THE TRIBE ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

This action brought by the Tribe is barred by the application of the doctrine of collateral estoppel. Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); Montana v. United States, supra, at 153. In this case, it would be grossly unfair for the Tribe to

force WWP to the additional expense of defending itself against the same claim raised by the Tribe before the Federal Power Commission and then the Federal Energy Regulatory Commission, which issues were ultimately decided by the United States Court of Appeals in the District of Columbia. The Tribe elected the forum in which to present its claims. (See Affidavit of J.K. Boyd dated October 6, 1989.) WWP argued that FERC had no jurisdiction. The Tribe insisted on going forward and requested FERC to make a determination. FERC made such a determination; however, based upon the record before the FERC, the United States Court of Appeals determined that the decision of the FERC was clearly erroneous and reversed the FERC and confirmed WWP's claim that it has all right, title and interest necessary for the construction, operation and

maintenance of the Little Falls Hydroelectric Development, and that WWP acquired those rights from the United States prior to 1920. WWP v. FERC, supra. The Tribe apparently desires a different result in this proceeding. However, having initiated the other proceeding and having pursued such proceeding over the opposition of WWP, it would be grossly unfair and improper for the Tribe to now be able to ignore the effect and result from the other proceeding and pursue this proceeding.

The argument may be made that the proceeding before the FERC was an administrative proceeding and that the review before the United States Court of Appeals in the District of Columbia was the review of an administrative proceeding. Regardless, the Tribe elected to pursue the administrative proceeding over the objection of WWP. Furthermore,

it cannot be doubted that the United States Court of Appeals for the District of Columbia was competent to determine the legal issues concerning the effect of an Act of Congress and the actions of the Secretary of the Interior with respect to an Act of Congress and the rights, title and interests acquired by WWP pursuant to such Act of Congress. The fact that the matter went to the United States Court of Appeals for the District of Columbia is the result of the choice made by the Tribe to pursue the matter with the Federal Power Commission and the Federal Energy Regulatory Commission. See 16 U.S.C.A. § 8261(b), which provides for the review of decisions of the Federal Energy Regulatory Commission.

This Court has long supported the application of the doctrines of res judicata and collateral estoppel to bar multiple litigation of the same issues by

the same parties and piecemeal litigation. See Hatch v. Reliance Insurance Co., 758 F.2d 409 (9th Cir. 1985) and Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524 (9th Cir. 1985).

V. THE CLAIM OF THE TRIBE IS BARRED BY THE APPLICATION OF THE DOCTRINE OF EQUITABLE ESTOPPEL OR ESTOPPEL BY DEED.

The issue concerning the effect of the Act of March 3, 1905, has now been determined twice, once by the United States Court of Appeals in WWP v. FERC, supra, and in United States v. Big Bend Transit Co., 42 F.Supp. 459 (E.D.Wash. 1941). As in United States v. Big Bend Transit Co., as shown by the facts before the Court, Congress passed the Act of March 3, 1905, for the purpose of authorizing the construction of hydroelectric projects on the Spokane River. David Wilson and WWP applied for

the lands and rights necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Project. The Secretary of the Interior approved such applications and granted all of the lands and rights necessary for the construction of the Little Falls Hydroelectric Project, which rights were all acquired by WWP. WWP relied on such rights and expended more than $1.5 million prior to 1922 to construct the Little Falls Hydroelectric Development. David Wilson and WWP paid all monies due and payable under the 1905 Act. Finally, in 1924, a formal document in the form of a patent was issued to WWP. WWP has continued to operate and maintain the Little Falls Hydroelectric Development since its completion in 1911. It is clear, under the holding of United States v. Big Bend Transit Co., that the United States would be barred from challenging

the grants made under the 1905 Act. Since the Tribe derives whatever compensatory rights it may have from the United States (United States v. Aam, supra), the Tribe is also equitably estopped from challenging the grants made by the United States. In order to continue its claim for compensation, the Tribe must show that it has a compensable interest in the land which the Tribe claims. There is no evidence that Congress ever authorized any recognition or grant to the Tribe of any interest in the Spokane River.

VI . THE TRIBE'S CLAIM IS BARRED BY THE APPLICATION OF THE DOCTRINE OF LACHES.

The Tribe is apparently making a claim for property and a claim for damages based on alleged interference with a purported fishery at Little Falls in the Spokane River. With respect to the claim for property, WWP contends that the doctrine of laches should be applied to

bar such claim by the Tribe. The United States granted David Wilson and WWP the rights which WWP now owns. The Tribe has waited more than seventy years to bring this action. The facts that allegedly gave rise to this action occurred almost eighty years ago. There is no one living who has personal knowledge concerning the facts that existed at that time. The construction of the Little Falls Hydroelectric Development occurred with the expenditure of more than $1.5 million from 1908 to 1911. Such construction was obvious to all to see. If there had been any claim of any defect in title or any other claim made at that time, such matter could have easily been handled and any defect could have been corrected. It further appears that the Tribe inquired concerning the construction of the project and it also further appears that the Secretary of the Interior advised the

Tribe concerning the rights acquired by David Wilson and WWP. See Dellwo Affidavit, Exhibit No. 48. Yet, during all this time, the Tribe sat on its claim with the exception of the pursuit of a claim made before the Federal Power Commission and later before the Federal Energy Regulatory Commission starting in 1971.

There is some doubt that the doctrine of laches may be applied to a claim of the Tribe to property. County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, 244-45, 105 S.Ct. 1245, 34 L.Ed.2d 169 (1985). However, close scrutiny of the Oneida case shows that the Court did not rule on the application of the doctrine of laches since the issue was not raised before the Court of Appeals. However, it should be noted that four justices, in their dissent, concluded that the doctrine of

laches should have been applied. Id. at 256 and 261. Therefore, there is a very good argument that the doctrine of laches should be applied to a stale claim made with respect to property rights, particularly, as here, there are no witnesses who can describe from personal knowledge the facts.

Despite any claim based on Oneida that the doctrine of laches cannot bar a property claim by Indians (which the undersigned does not believe to be the holding of Oneida), the doctrine of laches should at least be applied to bar any claim which the Tribe now makes with respect to any alleged damages to a fishery. Again, because the Indians have sat on their rights, all witnesses who may have known the facts from personal knowledge concerning any alleged fishery at Little Falls on the Spokane River are long since deceased. Furthermore, there

is little or no documentary evidence concerning such a possible fishery. There is no way for WWP to defend against such a claim due to the passage of time and the unavailability of persons with personal knowledge concerning such facts. This is precisely the situation where the doctrine of laches should be applied to prohibit unfair prejudice to a person because a possible claimant sits on its rights. It should be noted that in 1942 the Tribe was inquiring concerning the rights acquired by WWP for the Little Falls Hydroelectric Development. Furthermore, it should be noted that the Tribe hired attorneys to make claims against the United States under the Indians Claims Commission Act, which claims had to be filed by 1951. See the Petition before the Indian Claims Commission filed by the Tribe, attached to the Affidavit of Jerry R. Boyd. Again,

this is precisely the type of case where the doctrine of laches should be applied. See the dissent in County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226, commencing at 255.

CONCLUSION

The claims of the Tribe in this matter are barred by two statutes of limitations and the application of the doctrines of res judicata, collateral estoppel, equitable estoppel or estoppel by deed, and laches.

RESPECTFULLY SUBMITTED this 6th day of October, 1989.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By_____

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SPOKANE TRIBE OF INDIANS,	)	No. C-82-753-AAM
Plaintiff,	)	WWP'S LR 56 STATEMENT OF FACTS IN REPLY
v.	)	
STATE OF WASHINGTON and WASHINGTON WATER POWER COMPANY,	)	
Defendants.	)	

The Washington Water Power Company (WWP) submits the following statement of facts pursuant to LR 56 in reply to the response submitted by the Tribe to WWP's Motion for Summary Judgment of Dismissal based on the statute of limitations, res

judicata, collateral estoppel, and laches. 1. The previous statements of fact, filed by WWP, pursuant to LR 56 are by this reference made a part hereof as though set out in full.

2. The Tribe instigated the proceeding before the Federal Power Commission and later the Federal Energy Regulatory Commission (FERC) and continued to pursue the proceeding before the FERC. (See the filings of the Tribe in the form of the Petition to Intervene and the Memorandum filed by the Tribe before the FPC and the FERC which are attached to the Affidavits of Jerry K. Boyd (JKB).

3. In the proceedings before the FPC and the FERC, the Tribe contended that WWP did not have all of the rights, title and interests necessary for the construction, operation and maintenance

of the Little Falls Hydroelectric Development. (Id.)

4. In the proceedings before the FERC, the Tribe urged the FERC to rule and the FERC ruled that the FERC had the necessary authority and jurisdiction to determine the rights, title and interests held by WWP with respect to the Little Falls Hydroelectric Development. See the copy of the Order of the Presiding Administrative Law Judge dated March 22, 1978; see the Memorandum of Law filed by the Tribe in response to the March 22, 1978, Order of the Presiding ALJ; and see the Order of the ALJ dated June 1, 1978, where the ALJ ruled that the FERC has jurisdiction to determine whether or not WWP has all of the rights necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. Indeed, the FERC and the Tribe took the same position

that WWP did not have all of such rights in their briefs filed with the United States Court of Appeals for the District of Columbia. (Brief of the FERC dated April 11, 1984, at pages 10 and 11 (which is attached to the Affidavit of Jerry K. Boyd dated October 25, 1989), and the Brief of the Spokane Tribe of Indians dated April 25, 1984, at pages 1 and 2 where the Tribe adopted the arguments made by the FERC in its Brief.)

5. Finally, by a decision, which is now published at 775 Fed.2d 305 (D.C. Cir. 1985), the United States Court of Appeals for the District of Columbia considered the decision of the FERC and the arguments made by the FERC and the Tribe whereby the rights of WWP with respect to the Little Falls Development were considered, construed, and determined, and wherein the Court reversed the FERC and made a

determination, as a matter of law, based on the record (which is substantially the same record as is now before this Court) that WWP does hold all of the rights, title and interest necessary for the construction, operation and maintenance of the Little Falls Hydroelectric Development. (A copy of the Opinion of the United States Court of Appeals for the District of Columbia is attached to the JKB Affidavit dated October 26, 1989. A copy of the Decision of the Court on the Petition for Rehearing and the Suggestion for Rehearing En Banc was denied by the Court is attached to said copy of the Opinion.)

DATED this 26th day of October, 1989.

PAINE, HAMBLEN, COFFIN, BROOKE & MILLER

By_____
Jerry K. Boyd
Attorneys for The Washington Water Power Company

BEFORE THE FEDERAL POWER COMMISSION
WASHINGTON, D.C.

In the Matter of the	)	Docket IT-5501
APPLICATION FOR LICENSE OF THE WASHINGTON WATER POWER COMPANY	)	Project 2545 Little Falls Dam

PETITION IN INTERVENTION

The SPOKANE TRIBE OF INDIANS of the State of Washington, by and through the undersigned, petition:

1. The Spokane Tribe of Indians is a legally constituted tribe, recognized by the Department of the Interior and the United States Government as an Indian tribe headquartered on the Spokane Indian Reservation. The tribe and reservation are instrumentalities of the Federal

Copy of above Petition in Intervention received this 5th day of February, 1971

Attorney for Washington Water

Government. The reservation was established by Executive Order of President Rutherford B. Hayes on January 18, 1881.

2. Said executive order established the boundaries of the reservation. In so far as they are relevant to this petition, the order established the Northeast corner of the reservation as the point where "Chemakane Creek crosses the 48th parallel of latitude, thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia river" etc. . .

3. The Spokane Tribe has heretofore filed its Resolution 1970-43 with the Federal Power Commission, advising that Commission of its interest in this application and authorizing its

undersigned attorney to appear for the tribe in this matter.

4. The application of the Washington Water Power Company and subsequent communications document the history of the alleged taking of the dam site, the flooded lands and the water rights, which history is by this reference made a part of this petition, as are the documents submitted by the Washington Water Power, to document it. In essence, the background cited by the Washington Water Power Company and the legal documents furnished by the Company sought to establish that allegedly by the 1905 Statute, which they cite and on which they rely, the Washington Water Power Company and its predecessor filed on and took the dam and power site known as Little Falls, the channel of the river behind Little Falls and the north bank of the River which was to be flooded,

without any compensation whatever to the Spokane Tribe of Indians save $701.87 paid to the tribe allegedly for the tribal acreages above the river's high water mark which Little Falls flooded.

5. The application for power licenses in which this petition in intervention is filed is an application for licenses to four dams in a series of six dams. It excludes the first dam in the series, Post Falls Dam, and the last day in the series, Little Falls Dam. Petitioner contends that said application, in so far as it excludes said dams, is deficient.

6. Little Falls Dam site and the dam itself and most of the lake behind it is within the southern and eastern boundaries of the Spokane Indian Reservation. Except for the flooded lands on the west bank and tail waters to the east of the confluence of Chemakane Creek

and the Spokane River all of the dam, its various power facilities, spillways, power house, etc., and all of the waters behind the dam are within the Indian reservation.

7. Petitioner claims a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statutes under which these proceedings are brought. Such right or interest is based on rights conferred by statutes of the United States; an interest which may be directly affected and which is not adequately represented by existing parties and as to which petitioner may be bound by the Commission's action in the proceeding and that said acts will detrimentally affect petitioner's rights herein or other interests of such nature that petitioner's participation may be in the public interest.

8. Other than said $701.87 which is the total amount the Spokane Tribe received for the alleged taking of the flooded lands, the tribe has never received any compensation for the use by the Washington Water Power Company of the dam site, the flooded lands, the river channel, which were and are still owned by the tribe or the waters of the river to which the tribe has valuable rights. It has received no damages or other compensation for the fact that the building of the Dam in 1908 forever destroyed Little Falls as a recreational, salmon fishing resource of the tribe.

9. The tribe has already filed herein its statement that after the building of Little Falls Dam the four other intermediate dams were built by the Washington Water Power between Post Falls Dam and Little Falls Dam. Long Lake Dam, just above Little Falls, created a large

lake 25 miles long. Ever since the building of Long Lake Dam the long, stagnant lake behind it has existed as a "sewage lagoon" for upstream polluters, primarily the City of Spokane. As outlined in the statements of the tribe and of the State of Washington on file herein dams of the Washington Water Power Company, the subject of this file and application, by holding and accumulating the upstream sewage and other effluents, has created, in addition to the basic pollution and contamination, a constant and permanent drop in the oxygen content of the waters, an increase in their temperature and in such things as algae bloom and other conditions which has resulted in the further destruction of the Spokane River waters where they form the southern boundary of the Spokane Reservation as a fishing, recreational resource. The fish die off has been

almost total. Thus the Spokane Tribe has, in addition to receiving no compensation for Little Falls Dam site, suffered irreparable loss in the value of these waters as a fishing, recreational resource and in the value of the abutting tribal and allotted lands as river and lake front property.

10. By reason of all of the foregoing factors, separately and in combination, the financial, esthetic, recreational and ecological loss of the Spokane Tribe because of the building of Little Falls Dam on the tribally owned damsite and the later building and operation of the upriver dams would, if valued and appraised in money, be astronomical and in fact irreparable and perpetual.

11. The Washington Water Power application, as aforesaid, claims that the Federal Power Commission has no

jurisdiction over either Little Falls Dam or Post Falls Dam by reason of the method of taking of these two dam sites and related areas and backwaters. In essence, its contention must be that without any compensation to the tribes involved or the United States Government it somehow received permanent, indefeasible title to the sites and land involved which it claims to hold in perpetuity without any past, present or future obligation to or jurisdiction by the tribes or the United States Government with regards to compensation, damages, regulation or operation. Additionally, the Washington Water Power Company contends that because it had this claimed title and rights to the sites before 1920, the effective date of the Federal Power Act, the Federal Power Commission does not have and will not acquire any jurisdiction over these two dams and that the Federal Power

Commission has jurisdiction over only the middle four dams of the six-dam series.

12. The Spokane Tribe alleges that the Federal Power Commission and the United States Government does have jurisdiction to license and relicense Little Falls Dam and that petitioner should be authorized to intervene in the Commission's consideration of the licensing of Little Falls Dam so that it can place before the Commission the consideration and determination of the Tribe's legal and equitable rights with regard thereto. The tribe bases its legal position as aforesaid on the following:

a. Little Falls Dam is an integral part of a project system and the Federal Power Commission having jurisdiction over four dams in the system has jurisdiction over the entire system, including Little Falls Dam.

The six-dam Spokane River system is a single integrated system or project fully coordinated and interrelated. It begins with Post Falls dam and the storage of at least one-half million acre feet of water on Coeur d'Alene Lake. There follows a sequence of impoundments and releases of water in the intervening dams, the existence of the long storage dam of Long Lake (25 miles long) and final use of these waters on peak of the day and peak of the season releases and impoundments, with the last dam of the series--Little Falls, which in effect is a regulating dam--benefiting most from the releases and impoundments of the upriver dams. The turbines at Little Falls might as well be a part of the turbines at Long Lake or at any of the upriver dams. It is only in combination with the upriver dams that Little Falls takes on its principal value--that of

being a peaking facility to be operated in close coordination with Long Lake and other dams upstream. The system might as well be one large eight hundred foot dam utilizing the entire fall of this 50-mile stretch of the Spokane River. In fact, the coordinated use of the six dams achieves a greater efficiency than if it were a single dam as a crest or a depression in the flow is allowed to move downstream through each dam in sequence meeting the hourly demands for energy of the City of Spokane and the adjacent area. Even the Washington Water Power Company refers in its applications to the plan system or the project system, using the word system in the singular rather than separately. In fact, this "system" is heralded all over the United States as one of the most efficient, integrated systems in existence.

b. Little Falls Dam separately and in combination with the other Dams of the six-dam system affects the navigability of the Columbia River and of the Spokane River itself.

The Washington Water Power Company itself, in its letter in this file dated December 31, 1962, included an exhibit (#21) quoting Public Notice P-57-58 by the Army Corps of Engineers, dated June 13, 1957, as follows:

> "Spokane River--This river enters Franklin Roosevelt Lake about five miles northerly of Peach, Washington, and is considered by the Corps of Engineers as being navigable to Little Falls, a distance of about thirty miles."

The Spokane River has an obvious effect on the navigability of the Columbia River and in fact the entire Spokane River System is navigable. The manipulation of water discharged through the Washington Water Power dams so affects the Columbia

river that the Company was required to join in singing the Pacific Northwest Coordination Agreement. Under the terms of this agreement, all water power users significantly affecting the storage capacity of dams along the Columbia River are required to regulate the water flow of their projects in order to assure maximum utilization of the water resources of the Columbia River. The Washington Water Power signed this agreement, recognizing the effect of its six-dam system on the federally regulated navigable Columbia and lower Spokane River. It agreed to control and release its storage waters in such a manner that all Columbia River users downstream to the Pacific Ocean would not be adversely affected. The Federal Power Commission has long recognized its powers to assert jurisdiction over projects lying on presumably nonnavigable waters which

significantly affect a navigable watercourse.

c. Little Falls Dam, in conjunction with the other five dams, is part of an integrated transmission system with close coordination of the power output and transmission among and between the six-dam system and with the Northwest power pool.

Not only are the generating facilities of the six dams on the Spokane River system integrated and operated in concert through coordinating releases and impoundments of upstream waters, but the transmission facilities of this system are similarly integrated so that they operate as a single system. After the commingling of the power output of the six dams, the combined, integrated output is fed into the entire facilities of the Washington Water Power Company and into the Northwest power pool, transmitted

back and forth across state lines, completely losing its identity.

The operation of Little Falls as part of the six-dam plant system, in conjunction with the other Washington Water Power facilities and in close coordination with the entire Northwest power pool contributes immeasurably to its value as a single power producer. Its low water flow is firmed up and made more responsible to daily and seasonal needs and such seasonal variations as exist with low water and high water are counteracted by the integrations of the dam into the entire system and the Northwest power pool.

d. Little Falls Dam and its operation vitally affects Federal Reserve lands, namely, the Spokane Indian Reservation.

Because Little Falls Dam rests on tribal lands and its backwaters overflow

tribal lands, it is subject to 15 USCA 803c which provides for the fixing of a reasonable annual charge for the use of such lands. The tribe has received no compensation whatever for its loss of a prime fishing site and for the use of its lands and waters. In such instances, the Federal Power Commission can act as a forum to provide jurisdiction and to issue orders to protect the rights of the federal government and its wards, the Indians, in any dams over which it has jurisdiction.

Conversely, the existence of this obligation re Indian tribes and Federal Reserve lands implies and creates the jurisdiction needed to act as a forum for such purposes.

e. Little Falls Dam has been substantially modified so as to require its present licensing by the Federal Power Commission.

Since the enactment of the Federal Power Act, Little Falls Dam has been substantially modified, increasing its height, the head of the waters, the flooding of Indian land and its generating capacity. Its effective generating capacity has been substantially increased not only by these structural changes but by the firming up and regulation of the water flow by the five upstream dams and by its integration with the rest of the system and the Northwest power pool.

The SPOKANE TRIBE OF INDIANS, petitioner herein, therefore prays:

1. That the Federal Power Commission authorize the Spokane Tribe to intervene as a party in the application of the Washington Water Power Company.

2. That the Federal Power Commission require the licensing of Little Falls Dam as a condition of its

continued operation by the Washington Water Power Company.

3. That the Commission assume jurisdiction as a judicial forum to litigate and decide the rights of the Spokane Tribe with regard to the past, present and future operation of Little Falls Dam and that it award the tribe damages and compensation for the initial taking of the site the dam occupies and its past and future operation as a power dam.

4. That the Commission by its orders provide for the eventual extinguishment of all the rights the Washington Water Power Company may have to Little Falls Dam site and the reversion of those rights to the Spokane Tribe of Indians.

5. That the Commission grant such other relief as is proper in the premises.

SPOKANE TRIBE OF INDIANS

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STATE OF WASHINGTON)
: ss
County of Spokane)

ROBERT D. DELLWO, being first duly sworn, states that he is of counsel for Petitioner, the Spokane Tribe of Indians, in the foregoing Petition for Intervention; that he has read said Petition and knows the contents thereof; and that all of the statements contained therein are true and correct to the best of his knowledge and belief.

_____

Sworn to and subscribed before me, a notary public, in and for said county and State, this 5th day of February, 1971.

_____
Notary Public
My commission expires _____

PATENT RECORD
STEVENS COUNTY, WASHINGTON

-87040-

5963
Noted VGS 9/5/24
9/18/24
Noted-Miller
9/16/24
Noted NAV

WHEREAS, The Act of Congress approved March 3, 1905, (33 Stat., 1006), provided as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right to the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation may, with the consent of the Secretary of the Interior, be acquired by any citizen, association, or corporation of the United States appropriation under and pursuant to the laws of the State of Washington.

"Sec. 2. That the Secretary of the Interior by, and [he] hereby is, authorized and empowered to grant such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indians, but which has not been conveyed to the allottee with full power of alienation, or whether the same remains unallotted, on the north bank of the said Spokane River, such as shall be necessary and requisite for overflow rights and for the erection of suitable water, electrical or power plants, dams, wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water:

Provided, that no lands shall be granted under this Act until after the Secretary of the Interior is satisfied that the person, association, or company applying

has made said application in good faith and with intent and ability to use said lands for the purpose above specified and that it requires the quantity of land applied for in such use, and in case of objection to the grant of said land shall be made, the said Secretary shall afford the parties so objecting a full opportunity to be heard.

"Sec. 3. That the compensation to be paid for said land by said applicants shall be determined in manner prescribed in Section three of the Act of March second, eighteen hundred and ninety nine, entitled 'An Act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands and Indian allotments, and for other purposes.'

"Sec. 4. That if the land allotted in severalty to any individual Indian which has not been conveyed to the

allottee with full power of alienation be granted to any such appropriator, the Secretary of the Interior is empowered to use the moneys received for such land so allotted in the purchase of other suitable lands for such allottee.

"Sec. 5. That the Secretary of the Interior shall make all needful rules and regulations not inconsistent herewith for the proper execution and carrying into effect of this Act."

AND WHEREAS, On November 3, 1906, the Secretary of the Interior approved the amended application of David Wilson for a power site and water rights on the Spokane River, pursuant to the provisions of said act of March 3, 1905, and at the same time approved a map showing the lands on the north bank of the said river considered necessary and requisite for overflow rights.

AND WHEREAS, On July 6, 1907, David Wilson assigned to the Washington Water Power Company the rights acquired by him under the approval of the Secretary of the Interior referred to above, and the said assignment was approved and recognized by the Secretary of the Interior:

AND WHEREAS, The said Washington Water Power Company applied for a power site and water rights on the Spokane River pursuant to the provisions of the said act of March 3, 1905, affecting a tract of land adjoining the land affected by the approved application of the said David Wilson, which application of the said Washington Water Power Company was approved by the Secretary of the Interior on August 29, 1908.

AND WHEREAS, The Secretary of the Interior has heretofore given his consent to acquisition by the said David Wilson

and the said Washington Water Power Company of the right to the use of the waters of the Spokane River for power purposes under and pursuant to the laws of the State of Washington, where the said river forms the southern boundary of the Spokane Indian Reservation as provided in Section One (1) of the said act of March 3, 1905:

AND WHEREAS, The said David Wilson and the said Washington Water Power Company have made full payment of the compensation found by the Secretary of the Interior to have been lawfully due in connection with both the allotted and tribal lands involved, as provided in Section Three (3) of the said act of March 3, 1905:

AND WHEREAS, Pursuant to instructions approved by the Secretary of the Interior, the land on the north bank of the said Spokane River affected by the

said approved application of David Wilson and the Washington Water Power Company have been surveyed by a United States cadastral engineer, and the supplemental plats (in two sheets) which were prepared from the field notes of the survey, were approved by the United States Surveyor General for the State of Washington on February 9, 1914, and were accepted by the Commissioner of the General Land Office on March 3, 1924:

AND WHEREAS, The lands on the north bank of the said Spokane River affected by the said applications of David Wilson and the Washington Water Power Company are segregated on the said supplemental plats of survey as Tract No. 37, in Sections 10, 11, 15, 16, 17 and 20, of Township 27 North of Range 39 East of the Willamette Meridian, Washington:

AND WHEREAS, It appears from the records of the Department of the Interior

that the said David Wilson and the said Washington Water Power Company made said applications in good faith and with intent and ability to use said Tract No. 37 for the purposes specified in said act of March 3, 1905 and that the Washington Water Power Company requires the quantity of land applied for in such use:

AND WHEREAS, The said David Wilson and the said Washington Water Power Company have complied with all the rules and regulations promulgated by the Secretary of the Interior under the said act of March 3, 1905, and with all the provisions of said act:

THEREFORE, I, Hubert Work, Secretary of the Interior, as authorized and empowered by Section Two(2) of the said act of March 3, 1905, hereby grant unto the Washington Water Power Company the following described land, to the extent

and for the purposes that the Secretary of the interior is authorized to grant the same under the said act of March 3, 1905, to wit: Tract 37, in Section 10, 11, 15, 16, 17 and 20 of Township 27 North of Range 39 East of the Willamette Meridian, State of Washington, as described upon the said official plat of survey (in two sheets) hereinbefore recited, which plats of survey for the purposes of description are attached hereto and made a part hereof.

IN WITNESS WHEREOF, I have signed this instrument this 2nd day of July, 1924, and caused the seal of the Department of the Interior to be affixed hereto.

Seal: Department of the Interior.

Hubert Work,
Secretary of the Interior.

Witnesses to signature:

E.E. Burlow
M.R. Brock

[MAPS OMITTED]

A C K N O W L E D G M E N T

District of Columbia)
)SS
City of Washington)

I, W. Bertrand Acker, Notary Public in and for the City of Washington, District of Columbia, do hereby certify that on this 15th day of July, 1924, personally appeared before me Hubert Work, the Secretary of the Interior, to me known to be the party described in, and who executed the attached instrument under date of July 2, 1924, in his official capacity of Secretary of the Interior.

Seal: W. Bertrand Acker, Notary Public, District of Columbia.

W. Bertrand Acker,
Notary Public in and for the City of Washington, District of Columbia.

My commission expires December 16, 1925.

Filed for record at the request of The Washington Water Power Company, Spokane, Washington, October 24th, 1924, at 2:19

o'clock P.M., and recorded October 25, 1924.

_____/s/_____, Deputy. DOROTHY LEXTER, COUNTY AUDITOR.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

The Washington Water Power Company) Project No. 2545

ORDER CALLING FOR THE FILING OF MEMORANDA

(March 22, 1978)

The Commission's hearing order of July 20, 1977 identified four questions which need to be resolved in this case to determine whether the agency has licensing jurisdiction over The Washington Water Power Company's two other hydroelectric developments--Post Falls and Little Falls--located on the Spokane River.*

In a recent status report submitted to the Presiding Judge, the Company takes the position that the Commission lacks the power to inquire into the first of these questions--"Whether The Washington Water Power Company posses a permit or valid existing right-of-way granted prior to

June 10, 1920 [pursuant to Section 23(b) of the Federal Power Act] for the continued operation and maintenance of the Little Falls and Post Falls developments?"

On or before April 12, 1978, each party to this proceeding--including the Company--shall file with the President Judge a memorandum containing supporting points and authorities addressing the issue raised by the Company. Each memorandum shall also address a second point raised by the Company in its status report--that even if the Commission has the power to inquire into the first of the questions presented in its hearing order, the United States and the Spokane and Coeur d'Alene Tribes of Indians are estopped to deny the existence of the pre-1920 rights of the Company and are barred by the doctrine of laches to make any claim for money against the Company.

Raymond M. Zimmet
Presiding Administrative Law Judge

* By order issued August 17, 1972, the Commission granted a license to the Company covering four other hydroelectric developments on the Spokane River (Project No. 2545).

11 FERC ¶ 63,001

Washington Water Power Company, Project No. 2545

Presiding Administrative Law Judge's Initial Decision Determining Commission Jurisdiction Over Hydroelectric Development

(Issued April 1, 1980)

Michel Levant, Presiding Administrative Law Judge.

Appearances

Jerry K. Boyd, Alan P. O'Kelly, Lee S. Sherline and *Peyton G. Bowman, III,* on behalf of the Washington Water Power Company.

Robert D. Dellwo and *Gary T. Farrell* on behalf of the Coeur d'Alene and Spokane Indian Tribes.

Charles E. O'Connell, Jr., on behalf of the Secretary of the Interior.

Linda Lee and *Peter Lesch* on behalf of the Staff, Federal Energy Regulatory Commission.

To be determined in this proceeding is the Commission's jurisdiction to license the Washington Water Power Company's Little Falls development on the Spokane River in the State of Washington.

Procedural Background

On August 17, 1972, the Commission granted a license to the Washington Water Power Company (WWPC) for the continued operation and maintenance of Project No. 2545 located on the Spokane River in the State of Washington and which, as licensed, includes the Upper Falls, Monroe Street, Nine Mile, and Long Lake developments. *Washington Water Power Co.*, 48 FPC 339. The Commission reserved its ruling on jurisdiction over WWPC's Little Falls and Post Falls developments also located on the Spokane River.[1] The Commission set the matter for hearing by order issued July 20, 1977.

The Spokane Tribe of Indians (the Spokane Tribe) filed a late Petition for Intervention on February 5, 1971, which WWPC promptly moved to dismiss. The Spokane Tribe filed an amended petition on February 22, 1971, which the Commission

granted on April 12, 1971. On February 13, 1973, the Secretary of Interior (Secretary) filed a Petition for Intervention on behalf of both the Spokane Tribe and the Coeur d'Alene Tribe of Indians. By its answer, filed March 23, 1973, WWPC moved to dismiss this Petition for Intervention. The Commission granted the Secretary's Petition for Intervention by order issued on April 24, 1973. Another Petition for Intervention was filed on behalf of the Coeur d'Alene Tribe of Indians on June 28, 1973, and again, WWPC moved to dismiss this Petition by its answer filed July 10, 1973. The Commission permitted intervention by the Coeur d'Alene Tribe of Indians by order dated September 14, 1973.

On March 12, 1979, the parties jointly filed a settlement agreement concerning the Post Falls development wherein WWPC agreed to file an application

to include the Post Falls development (on Coeur d'Alene Lake) within the license for Project No. 2545.[2] The Commission approved the settlement agreement by order issued July 9, 1979, 8 FERC ¶ —.

On July 17 and 25, 1979, a hearing was held on the issue of Commission jurisdiction over the Little Falls development.[3] Initial briefs were filed by WWPC, the Spokane Tribe, the Secretary and the Commission Staff on September 24, 1979. Reply briefs were filed by these parties on October 22, 1979.

The Issues

In its order of July 20, 1977, the Commission stated that a determination of jurisdiction involved the following issues:

(1) Whether the Washington Water Power Company possesses a permit or valid existing right-of-way granted prior to June 10, 1920, for the continued operation

and maintenance of the Little Falls and Post Falls development?

(2) Whether the Washington Water Power Company has modified the original works such that it exceeded the authority contained in the original grants for Post Falls and Little Falls developments, thereby subjecting those developments to licensing, according to the holding in *Northwest Paper Co. v. F.P.C.*, 344 F.2d 47 (CA8—1965)

(3) Whether operation of the Post Falls or Little Falls developments affects United States lands outside of the area covered by the permits claimed by The Washington Water Power Company?

(4) Whether the Post Falls and Little Falls developments, operated in coordination with Project No. 2545, constitute a part of that project and must be licensed as such, regardless of the

existence of a pre-June 10, 1920, permit or valid right-of-way?[4]

Since no party contends that there has been significant modification of the Little Falls development or that the Little Falls development occupies lands of the United States outside the area covered by the permits claimed by WWPC, issues two and three are rendered moot. Staff, the Spokane Tribe, and the Secretary, all of whom support the exercise of Commission jurisdiction over the Little Falls development, present their respective positions on issues one, four and on the issue of whether the Spokane River is a navigable water of the United States.

Counsel for the Spokane Tribe argues on brief that certain actions of the Secretary during the period of 1905 through 1924 were invalid and questions WWPC's title to the Indian reservation lands, where the Little Falls development

is situated. It is further suggested that the site was acquired without just compensation or due process of law. The resolution of these questions is beyond the scope of this proceeding. The Presiding Judge has already ruled that the appropriateness of the actions taken by the Department of the Interior or the Secretary would not be determined in this proceeding.[5] These actions will, however, be considered on their face in determining whether WWPC received a permit or valid existing right-of-way prior to June 10, 1920, in accordance with the provisions of Section 23(b) of the Federal Power Act.[6]

Decision on the issue of Commission licensing jurisdiction will thus be focused on determination of the threshold issue of whether WWPC possessed a valid permit or right-of-way prior to June 10, 1920. The decision will not address questions of land titles, water rights,

compensation, or Spokane Tribal rights, since these are clearly extraneous to a determination of the threshold jurisdictional issue. Upon a determination that WWPC does not have a valid pre-1920 permit, examination of the bases for exercise of Commission jurisdiction under the Federal Power Act, such as the navigability of the Spokane River and the hydraulic and electrical coordination of the Little Falls development with other developments, would then be in order.

Discussion

Pre-1920 Permit

Staff, the Spokane Tribe, and the Secretary contend that WWPC does not possess a valid pre-1920 permit. WWPC maintains that it does on the basis of a series of events which culminated in the issuance by the Secretary of a specific authorization, dated July 2, 1924.[7] WWPC claims authorization pursuant to an Act of

Congress, dated March 3, 1905 (Act of 1905),[8] which authorized, subject to the Secretary's consent, acquisition of the right to use the waters of the Spokane River. The 1905 Act also empowered the Secretary to grant lands "necessary and requisite for overflow rights and for the erection of suitable water, electrical or power plants, dams, wingwalls, flumes, or other needful structures required for the development of power or for the beneficial use of said water" along the Spokane River on the south boundary of the Spokane Indian reservation to appropriators under and pursuant to the laws of the State of Washington.[9] Before the Secretary could make such a grant, however, he was to be "satisfied that the person, association, or company applying has made said application in good faith and with intent and ability to use said lands for the purposes above specified and that it

required the quantity of lands applied for in such use. . . ."[10] In addition, the applicant was required to make compensation to the United States in the manner provided in an 1899 Act for acquiring rights of way by railroad companies through Indians reservations, lands, and Indian allotments."

The events which preceded the July 2, 1924 grant by the Secretary, are embodied in a series of exhibits consisting essentially of correspondence and documents by David Wilson, WWPC, the Secretary, the Commissioner of Indian Affairs and other lesser officials of the Department of Interior and the Bureau of Indiana Affairs. Most of these exhibits speak for themselves and are not in dispute. They establish that on May 4, 1906, David Wilson received authorization from the Secretary to acquire about 200 acres of Spokane Indian Reservation land

and the right to use the waters of the Spokane River for water power, under the Act of 1905.[12] An amended application by David Wilson, for additional lands was approved by the Secretary on November 3, 1906.[13] A chronology of the principal events which followed is set forth below.

Some six weeks after David Wilson received his grant from the Secretary, he contracted to convey to WWPC his interest in the Spokane Indian Reservation lands for $25,000 and his interest in certain water rights for $100,000.[14]

On June 13, 1907, David Wilson applied to the State of Washington for Spokane River water rights, asserting that it was his intention to erect a dam on the site for the purpose of generating electricity and for other purposes.[15]

On July 8, 1907, David Wilson conveyed in two instruments his land and water interests in the power site to

WWPC.[16] Thereafter, WWPC filed a petition with the Secretary on May 18, 1908, requesting a grant under the Act of 1905 for an additional eight acre parcel within the Spokane Indian reservation, adjacent to the Wilson grant, and related water rights.[17] In that petition WWPC acknowledged its acquisition of the Wilson power site, but did not request the Secretary to take any action with respect to the Wilson conveyance. WWPC received approval of its application for the eight acre parcel on August 29, 1908.[18]

On December 15, 1908, David Wilson conveyed certain additional water rights to WWPC for $1,000.[19]

Construction of the Little Falls development, which is comprised of a dam, two tainter gates, spillway, wingwalls, and a powerhouse with four water turbines,[20] commenced sometime in the fall of 1908 and was completed, with power

generation from the fourth unit, sometime in 1911.[21]

In a letter to the Assistant Commissioner of Indian Affairs, dated May 5, 1909, WWPC suggested the possibility of acquiring additional Spokane Indian reservation lands under the Act of 1905, for the purpose of developing another power plant, and inquired about compensation for such lands as well as the character of the grant which the Secretary would issue.[22] On May 8, 1909, the Secretary responded that compensation would be determined according to the Act of March 2, 1899, and that the title granted under the Act of 1905 would be a full and permanent title, revocable only for non-use.[23]

On July 6, 1909, WWPC submitted a resurvey of the Wilson grant to the Secretary, requesting that the grant be amended accordingly.[24] In a letter, dated

May 26, 1910, WWPC was advised that the amendment of the Wilson grant to conform with the resurvey had been approved.[25]

A letter, dated September 27, 1913, from the General Land Office to the Commissioner of Indian Affairs notes discrepancies resulting from the amended grant, and also raises a question about the nature of the grant.[26] The letter is entitled "Application of David Wilson to acquire overflow rights in the Spokane Indian Reservation."

Some 10 years later, on April 30, 1923, the Assistant Secretary of Interior, in a communication to the General Land Office, approved the issuance of patents to WWPC for lands acquired from Wilson and for lands acquired by WWPC in its own right.[27] On May 10, 1923, however, the Secretary of Interior reversed the decision of the Assistant Secretary and denied patents to WWPC.[28] Thereafter, on

July 2, 1924, the Secretary tendered an instrument to WWPC which made the following grant:

> Therefore, I, Hubert Work, Secretary of the Interior, as authorized and empowered by Section Two (2) of the said act of March 3, 1905, hereby grant unto the Washington Water Power Company the following described land, to the extent and for the purposes that the Secretary of the Interior is authorized to grant the same under the said act of March 3, 1905, to wit: Tract 37, in Sections 10, 11, 15, 16, 17 and 20 of Township 27 North of Range 39 East of the Willamette Meridian, State of Washington, as described upon the said official plat of survey (in two sheets) hereinbefore recited, which plats of survey for the purposes of description are attached hereto and made a part hereof.[29]

A review of these events leads to the conclusion that prior to July 2, 1924, WWPC did not have an authorization from the Secretary granting it rights to the Wilson power site under the Act of 1905. This is obviously not the case with

respect to the eight acre parcel and related water rights for which WWPC made application and received approval from the Secretary. WWPC proceeds, however, on the theory that the actions of the Secretary in 1906, when a grant was made to David Wilson, in 1908, when WWPC received its grant for the adjacent eight acre site, and in 1910, when the original Wilson grant was amended pursuant to a resurvey, constitute a grant of its rights to the Wilson power site and that the 1924 instrument was "merely a final administrative act."[30] In support of this theory, WWPC maintains that the grant to David Wilson was not a personal grant to him and that since the Act of 1905 is silent as to transfers, David Wilson's conveyance of his rights to WWPC was sufficient to transfer the rights granted to Wilson by the Secretary.

Though the Act of 1905 is silent on the mechanics of transfer, WWPC concedes that in making a grant under that act the Secretary had to be satisfied "that the person, Association or Company applying has made said application in good faith and with intent and ability to use said lands for the purpose above specified and that it requires a quantity of land applied for in such use...."[31] From the plain meaning of that language, it is clear that the Secretary was required to pass upon the person, association or company that would acquire the "right to use to the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian reservation" and to use lands of the reservation for the purposes set forth in the Act. The Secretary passed upon David Wilson's application and approved the Wilson grant. The Secretary did not,

however, pass upon an application by WWPC for the Wilson power site, until 1923. The fact that the Secretary approved WWPC's application for an adjacent eight acre site does not establish Secretarial action on the transfer of the Wilson grant.

While specific requirements for the transfer of a grant are not established, it appears from the Secretary's November 3, 1906 letter granting David Wilson's amended application that the Department was rather strict in controlling the rights which it granted. This may be seen from the Secretary's instructions to the Commissioner of Indian Affairs:

> There is also granted to the said David Wilson, the right to use the waters of the Spokane River, as contemplated by said Act, subject to any prior, valid existing rights and adverse claims, with the understanding that he will execute and file with the Department an instrument relinquishing all rights heretofore acquired by virtue of Departmental approval

> on May 8, 1906, of his former application.[32]

David Wilson subsequently executed a document relinquishing his rights to the initial grant conditioned upon the approval of his amended application, on November 2, 1906.[33] The deeds of conveyance by David Wilson to WWPC are also instructive of the parties' understanding with respect to the Wilson power site.[34] In the deed conveying water rights, executed July 8, 1907, Wilson provided:

> And we hereby authorize and empower the said The Washington Water Power Company, upon its performance of the conditions required by the said Act of Congress of March 3, A.D. 1903, to demand and receive from the United States a patent, or other evidence of title, as the rules of the Interior Department of the United States may prescribe, for the above assigned water right and water power in the same manner to all intents and purposes as we ourselves or either of us might or could do,

> were these presents not executed.[35]

Notwithstanding this suggestion that WWPC might need to secure a patent or other evidence of title in accordance with rules of the Department of the Interior, there is no evidence that WWPC made any effort to discover what documentation, if any, was required when it accepted the Wilson transfer. Nor is there any indication that any such documentation was sought when WWPC later made application for the additional eight acre parcel. WWPC evinced some uncertainty as to the nature of grants made by the Secretary under the Act of 1905 when it directed an inquiry to the Assistant Commissioner of Indian Affairs on May 5, 1909, yet it took no action with respect to the Wilson power site.

No explanation is offered in the record for WWPC's failure, prior to 1923, to take what would appear to be reasonable

measures to secure appropriate documentation from the Secretary. Staff in its reply brief suggests that there is some question as to whether the Secretary would have approved the transfer of the Wilson power site. Staff notes that David Wilson acquired rights to the site by paying slightly more than $1000 in damages to certain Indian tribal members,[36] and then within six weeks, sold the site to WWPC for an enormous profit ranging from $25,000 to $100,000,[37] thereby raising a question of good faith concerning David Wilson's original application. It serves no useful purpose to speculate on what the Secretary's determination might have been in light of these facts. The evidence in this record must establish the nature of authorization, if any, which WWPC received from the Secretary prior to the enactment of the Federal Water Power Act.

In subsequent dealings with the Department of the Interior or the Bureau of Indian Affairs the fact that WWPC had acquired the Wilson power site was admittedly not concealed; however, all references were made to the Wilson grant rather than to a new WWPC grant. This indicates how the Department of Interior carried this grant on its records. This is confirmed by a letter, dated September 27, 1913, the subject of which is shown as the "Application of David Wilson to acquire overflow rights in the Spokane Indian Reservation."[38] If David Wilson had not at that late date filed the application, the General Land Officer apparently assumed that it was an application from the grantee of the Wilson power site.

In a letter, dated February 12, 1910, to the Superintendent of the Colville Indian School about a further amendment of the Wilson grant, reference is made to a

WWPC application "simply to have the description of the grant amended in accordance with the location as fixed by special allotting agent Clair Hunt."[39] Again, WWPC showed no interest in changing the Wilson grant to a WWPC grant to reflect its acquisition thereof. The fact that the Department amended the Wilson grant on the basis of a resurvey and at the request of WWPC, does not establish that an authorization was granted to WWPC.

Following amendment of the Wilson grant in 1910, nothing significant with respect thereto occurred until after the passage of the Federal Water Power Act, on June 10, 1920. Upon an application by WWPC on April 30, 1923,[40] some 13 years after amendment of the Wilson grant, the Assistant Secretary of the Interior, in response to the "question whether or not the Washington Water Power Company is entitled to issuance of patents,"

determined that patents should be issued to WWPC upon its tender of an approved plat of survey.[41]

WWPC explains that it sought a patent in 1923 because "the signature of the Secretary of the Interior [on the maps of the Wilson grant and WWPC's grant[42] had not been acknowledged by a notary public and, therefore, was not in the form which could have been recorded in the county records under Washington law and was probably not in the form generally acceptable to attorneys reviewing the documents on behalf of financial institutions in connection with the issuance of debt securities secured by a mortgage."[43] WWPC believes it was appropriate for the Company to seek a more formal document which was in a form more consistent with that of a deed or patent.

This explanation raises more questions than it answers. If WWPC already

had deeds executed by David Wilson sufficient to transfer the Wilson power site interest, why did WWPC seek a further deed or patent from the Secretary in 1923? If the problem was the omission of the notorization of the Secretary's signature on the maps, why were the maps themselves not corrected in lieu of the issuance of a grant by the Secretary? The matter is not sufficiently explained by a claim that a deed or patent would constitute a "more formal document," when the original evidence of the transaction was not a document, but merely a map. Since both Exhibits 81 and 82, which cover the Wilson grant, are dated in 1906; why did some 17 years elapse before it was deemed appropriate to seek a more formal document? The explanation offered by WWPC is simply not persuasive. The fact remains that the first time WWPC sought authorization from the Secretary for the

Wilson power site was after the enactment of the Federal Water Power Act.

WWPC takes issue with the Staff's and the Secretary's position that in order for the rights granted to David Wilson to be transferred, the Secretary had to execute a formal document of approval, and further, that the burden of proving such a formal document exists is upon the Company. WWPC attempts to distinguish the Act of February 15, 1901 (31 Stat. 790) from the Act of 1905 in that the former restricted a Licensee's right of alienation or transfer, while the latter did not.

While the terms of the Act of 1905 did not prohibit alienation or transfer of a grantee's rights, the requirement that the Secretary pass upon an applicant would perforce require the Secretary to pass upon a transferee. A contrary interpretation would render the

Secretary's obligation to pass upon the recipient of a grant meaningless. Thus, in order for WWPC to possess a valid grant under the Act of 1905, it must have received Secretarial approval of the transfer and there should reasonably be some documentary evidence thereof. The form of such documentary evidence has not been precisely established on this record. But there is evidence of what WWPC and the Secretary ultimately regarded as an appropriate form, to wit, WWPC's application for a patent in 1923 and the Secretary's response thereto in 1924 tendering a grant. Without placing form over substance, the record is simply devoid of documentary evidence in any form indicating Secretarial approval of the transfer of the Wilson grant to WWPC, prior to the enactment of the Federal Water Power Act.

WWPC believes to maintain that the transfer of rights by David Wilson to WWPC was not approved by the Secretary is tantamount to saying that "the Secretary of Interior from 1908 through 1924 was grossly negligent or committed fraud."[44] This assertion is wholely unfounded. As previously noted, the fact that David Wilson had obtained a grant for a power site under the Act of 1905 and, within six weeks of receiving the amended grant, contracted to convey this grant to WWPC was made known to the Bureau of Indian Affairs and the Department of the Interior. The subsequent development by WWPC of the Wilson power site from 1908 to 1911, as well as the 1910 amendment of the Wilson grant, were likewise known to officials handling these matters. But this knowledge by the Department does not compel the conclusion that the Secretary made a grant to WWPC under the Act of 1905

with respect to the Wilson power site. Indeed, a strong indication that WWPC itself was uncertain about the Secretary's action is shown by its application for a patent for that site in 1923. That the Department did not urge WWPC to secure a Secretarial grant for the Wilson power site, does not reflect negligence or fraud, but simply government inefficiency.

The ultimate responsibility to secure the necessary authorization and to comply with existing law falls upon WWPC. The courts have stated that action (or inaction) by government officials cannot bar the government from requiring development owners to comply with applicable statutes and regulations. *Montana Power Co. v. F.P.C.*, 185 F.2d 491, 497 (CADC—1950). Under the circumstances, WWPC is not discharged of its burden of showing that it possesses a permit or valid right of way granted prior to June

10, 1920, as prescribed by Section 23(b) of the Federal Power Act, unless it be concluded that it is in violation of that Act. *United States v. Norfolk-Berkley Bridge Corporation,* 29 F. 2d 115, 124-25 (E.D. Va. 1928).

WWPC asserts that when Congress enacted the Federal Water Power Act of 1920 (FWPA) and the Federal Power Act of 1935, it did not intend to affect any existing rights of way previously granted. This is undisputed. It also contends that Congress intended that the Secretary of the Interior or other agency be permitted to complete the proceedings required for the acquisition of water power rights which have been commenced prior to the 1920 Act. In support, it cites the first proviso of Section 24 (16 U.S.C. 818) which reads as follows:

> Provided, That locations, entries, selection or filings heretofore made for lands

> reserved as water power sites, or in connection with water power development, or electrical transmission may proceed to approve or patent under and subject to the limitations and conditions in this section continued. . . .

Staff correctly notes that the provision cited relates to uses of such lands for other than hydroelectric development. The legislative history of the provision, as cited by Staff, clarifies this point:

> Section 10 [now Section 24] provides that where practicable the Secretary of the Interior may permit locations and entries upon the land for other hydroelectric purposes, but in every case upon the express condition that the entry is made subject to the right of the United States or its lessees or grantees to enter on said land and use so much of it as may be reasonably necessary for the higher purpose of generating and transmitting hydroelectric energy. This provision will enable the Interior Department to prevent hardships to settlers on withdrawn lands without in any way interfering with the water-power possibilities. House

> Report No. 842, 63rd Cong., 2d Sess., for H.R. 16673 (June 16, 1914).

As Congressman Ferris stated in the debates on H.R. 16673:

> The provision . . . provides that where locations, entries, or selections are filed or have been allowed the land shall proceed to patent, subject to a limitation to be inserted in the patent which shall preserve to the Federal Government all rights for power purposes. Cong. Rec., Hse., Vol. 51, page 13624 (August 11, 1914).

Congressman Mondell later stated in debates on S. 1419, concerning the same language:

> The amendment might provide that the commission shall . . . cause an examination to be made of lands that have been heretofore withdrawn for power sites and recommended to the Secretary of the Interior the restoration of such lands as in their opinion are not necessary for power site purposes. . . . If there should be any doubt in regard to that when the bill is in conference, then some slight modification should be made to make it clear that the lands have been withdrawn which are found after

> examination not needed for power development may be restored, the withdrawal revoked, so the entryman may proceed to secure his patent in fee without limitation. Cong. Rec., Hse., Vol. 56, page 10037 (September 5, 1918).

Finally, in a report dealing with the 1935 amendments to the FWPA, it was stated that Section 24 of FWPA provides that lands of the United States included in proposed project "may be opened for other uses by the Secretary of the Interior upon a commission determination that their value will not be injured or destroyed thereby."[45]

Staff contends that in 1924 the Secretary did not, in any event, have authority to approve the transfer of the Wilson grant to WWPC. Citing a ruling of the Attorney General,[46] it maintains that when the FWPA was passed, Congress placed in the hands of the Commission authority over all future and existing hydroelectric

developments, including administrative authority distributed among the Secretaries of the Interior, Agriculture, and War.[47] As pointed out by Staff in discussing the transfer of permits, the Attorney General stated that Section 8 of the Act (16 U.S.C. § 801),[48] in conjunction with Section 29 (16 U.S.C. § 823),[49] vested the Commission with the authority to approve transfers of outstanding permits or licenses issued by the various Secretaries, and that the Secretaries' authority on such matters had ceased.[50] Staff makes a persuasive argument that the Secretary did not have the authority to approve the transfer of the Wilson power site in 1924, but that is beside the point. The Federal Water Power Act prescribes a specific date, *i.e.*, June 20, 1920, by which a valid permit or right of way must have been obtained. Either WWPC obtained a permit or right of way

under the Act of 1905 prior to that date or it did not. As discussed above, the evidence in this case fails to show action by the Secretary on the transfer of the Wilson power site to WWPC prior to June 10, 1920. Since WWPC did not obtain any authorization prior to June 20, 1920, even under WWPC's theory, there was no tentative authorization for the Secretary's action of 1924 to have confirmed.

The Big Bend Precedent

WWPC maintains that most of the issues that are relevant herein were decided in *United States v. Big Bend Transit Co.*, 42 F. Supp. 459 (E.D. Wash 1941) (hereinafter *Big Bend*).

Big Bend was a condemnation case brought by the United States to acquire certain lands on the Spokane River which were flooded upon construction of the Grand Coulee Dam. Big Bend Transit Co.

sought to recover damages for loss of a power site which it claimed had been authorized by the Secretary under the Act of 1905. In *Big Bend,* the Secretary had actually granted the application of the Big Bend Transit Co. (Company) for a power site on the Spokane River on April 13, 1916, and also approved maps for the development on May 18, 1916. Six months before construction was to begin, war was declared and the Company advised the Secretary that, under the circumstances, construction could not be completed within the five years provided by the bond. The Department of the Interior advised the Company to wait until the five year period had expired before renewing its application. Subsequently, the Company decided that in order to finance the project it would require more satisfactory evidence of its title. In 1927, after a resurvey, the Secretary issued a

corrective grant. The project was never built as it became apparent that the construction of the Grand Coulee would flood the area involved. In permitting the value of the power site to be considered by a jury in this condemnation action, the Judge found that the 1916 grant of the Secretary was a valid pre-1920 permit under Section 23 of the Federal Water Power Act and that rights obtained under the Act of 1905 were not repealed by the passage of the Federal Water Power Act. *Big Bend* is clearly distinguishable on its facts from the instant case.

The principal distinction between this case and *Big Bend* is that in *Big Bend* it was clear the Big Bend Transit Co. received the requisite approval for the power site from the Secretary, prior to June 10, 1920; whereas here, the Secretary did not grant rights in the Wilson power site to WWPC prior to June 10, 1920. The

only rights which WWPC obtained from the Secretary prior to 1920 were to the eight acre parcel and related water rights. This is insufficient to exempt WWPC from Commission jurisdiction. In *Big Bend* the Secretary's action in 1927 merely confirmed a previous grant made to the Big Bend Transit Company; whereas here, the grant which the Secretary made in 1924 was the first approval received by WWPC of rights to the Wilson power site.

Another distinguishing factor is that in *Big Bend* the court was concerned with the right of the Big Bend Transit Co. to be compensated for its property interest in a power site; hence, the nature of its authorization from the Secretary was a collateral issue. In this case, however, WWPC's property interest in the Wilson power site is not an issue. Rather, the issue is whether WWPC obtained proper authorization under Act of 1905, prior to

the enactment of the Federal Water Power Act.

Many of the holdings in *Big Bend* alluded to by WWPC have no relevancy in this case. For instance, the Court's holding that the interest of a grantee in a right-of-way rests upon the approval of the map illustrating its location[51] has no application here because WWPC has not shown an approved map in connection with a grant made to it for the Wilson power site[52] prior to June 10, 1920. Similarly, the fact that the court found the Federal Water Power Act did not repeal the Act of March 3, 1905, is not determinative of whether WWPC had a valid permit for the Wilson power site prior to June 10, 1920. As the court explained:

> They argued that I must disregard Section 223 because they deny that on June 10, 1920, this defendant had any valid existing right of way which had theretofore been granted or any claim or any authority

> theretofore given pursuant to law. Since I have held that on June 10, 1920, defendant did have a valid and existing right of way and a claim of authority theretofore given pursuant to law, it follows necessarily that that right of way, grant or authority was not affected by any of the provisions of the Power Act. (*Big Bend* at 471)

The threshold jurisdictional question must necessarily be determined on the facts of this case. As discussed above, the facts of this case lead to the conclusion that WWPC does not have a valid pre-1920 permit.

WWPC contends that, as in *Big Bend*, the United States should be estopped from challenging the Company's title to the power site or the validity of grants. Estoppel does not apply in these circumstances. As stated earlier, WWPC's interest in the Wilson power site is of no concern here. And, no challenge is directed at a WWPC grant, because, except

for the eight acre parcel, none was made prior to June 10, 1920.

The fact that 70 years have elapsed since WWPC acquired the Wilson power site and constructed its hydroelectric development does not preclude enforcement of applicable statutes. The doctrines of laches and estoppel do not apply to jurisdictional proceedings. *Essex Co., et al.*, Docket No. E-9099, order issued June 17, 1976, 55 FRC 2926 at 2930.

It is concluded, absent a pre-1920 permit, that the Little Falls development is subject to the jurisdiction of the Federal Energy Regulatory Commission.[53] Whether or not WWPC must secure a license for its Little Falls development depends upon the finding of a basis under the Act, e.g., navigability of the Spokane River, for Commission assertion of its licensing jurisdiction.

Assertion of Licensing Jurisdiction

The two principal bases for jurisdiction which were litigated herein are navigability of the Spokane River and the hydraulic and electrical coordination of the Little Falls development with other developments of Project No. 2545.[54] The issue of navigability will be addressed first.

Navigability

Section 3(8) of the Federal Power Act defines "navigable waters" as:

> [t]hose parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting

> falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority[.][55]

The Supreme Court, in first passing on the question of navigability, established what has become known as the *Daniel Ball* definition of navigable waters:

> [t]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a

> continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[56]

Subsequent case law expanded this *Daniel Ball* definition to include waters which are "capable of use for the purposes of transportation and commerce"[57] and, later, "availab[le] for navigation given reasonable improvements."[58] The Court's most recent pronouncement on the meaning of "navigable waters" under the Federal Power Act is found in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), where the following standards on navigability of waters were set forth:

> When once found to be navigable, a water remains so.
>
> * * *
>
> [Navigability can be found] despite the obstruction of falls, rapids, sand bars, carries or shifting currents.
>
> * * *

> [A]bsence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.
>
> * * *
>
> [N]avigability may be of a substantial part only of the waterway in question.[59]

Furthermore, as resently [sic] observed by the Commission, the historic floatation of logs has, of late, played an increasingly dominant role in determining the navigability of waterways for purposes of the Federal Power Act. *Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Company,* Opinion No. 61, Docket No. E-9530, issued August 10, 1979, 8 FERC ¶ — mimeo p. 13 (citations).

WWPC contends that while court decisions of the past 40 years might bring legislation enacted during that period within the commerce clause, it was not the

intent underlying the 1905 Act—under which Little Falls Dam was constructed—, the 1920 Federal Water Power Act or the Federal Power Act of 1935. WWPC relies on the early *Daniel Ball* case;[60] *United States v. The Montello;*[61] and *Leovy v. United States,* 177 U.S. 621 (1900), because they were decided "at a time which was fairly contemporaneous with the passage of the Act of March 3, 1905 and . . . [thus] show the intent of Congress at that time."[62] In particular, WWPC urges that the true legal test for navigability was articulated in the *Leovy* case:

> It is a safe inference from these and other cases to the same effect which might be cited, that the term "navigable waters of the United States," has reference to commerce of a substantial and permanent character to be conducted thereon.[63]

Of concern here are "navigable waters of the United States" under Section 3(8)

of the Federal Power Act, and the standards set forth in *United States v. Appalachian Electric Power Co., supra,* are held "fully applicable" to "navigable waters under Section 3(8) of the Act." *Rochester Gas and Electric Corp. v. F.P.C.,* 344 F.2d 594, 596 (CA2—1965), *cert. denied,* 382 U.S. 832 (1965).[64] Moreover, as noted by the Supreme Court in *United States v. Appalachian Electric Power Co., supra,* each subsequent application of the so-called *Daniel Ball* test for navigability was "apt to uncover variations and refinements which require[d] further elaboration." *Id.* at 406. Accordingly, the more refined standards which have been elaborated will be applied. Those standards, as restated and summarized by the Second Circuit of Appeals, are that a stream is a navigable waterway "if (1) it *presently* is being used or is suitable for use, or (2) it has

been used or was suitable for use in the past or (3) it could be made suitable for use in the future by reasonable improvements." *Rochester Gas and Electric Corp. v. F.P.C., supra* at 596 (emphasis in original).

Evidence on Navigability

The Spokane River begins at Coeur d'Alene Lake in Idaho, flows in a west/northwesterly direction into Washington where it joins the Columbia River, a navigable waterway of the United States. Post Falls, Idaho, which is a natural 40 foot drop, is about eight miles below Lake Coeur d'Alene. Spokane Falls, which is about a 150 foot drop, is located in the City of Spokane, about 33 miles below Lake Coeur d'Alene. The Little Falls Dam is about 25 miles west of Spokane.[65]

Most of the evidence of navigation over the Spokane River consisted of written accounts of the transportation of

logs. Exhibit 126, for example, tells of log flotation from the entrance of the Spokane River to Spokane and beyond:

> In early days logs destined for the McGoldrick Mill were driven down the Spokane River to the millsite not far above Spokane Falls. Many of these logs came from high up on the St. Maries River, were driven down to the St. Joe, caught in booms at the sorting gap, towed across the lake, and let loose at the entrance of the Spokane River. Some of these logs made a journey of one hundred and fifty miles, all by water . . . .
>
> As the drive neared Spokane it netted, as always, a big audience on the riverbanks and bridges.[66]

The location of these logging activities was illustrated by Exhibit 130, a Spokane River Basin Map, which shows that most of the logs were felled in Idaho and floated downriver toward the saw mills in Spokane.

Exhibit 127, p. 2, documents Spokane's "first industrial venture," a saw mill set up in 1873 and supplied with

logs which had floated down the Spokane River.[67]

Exhibit 129 includes an 1884 newspaper account of a large log drive down the Spokane River to Spokane Falls:

> Yesterday the font [sic] end of the mammoth log drive that A.M. Cannon is bringing down the river reached this city, and his saw mill, that has been standing idle for some time for want of material to work on started up this morning and will keep going at full capacity the balance of the year. Mr. Cannon has succeeded in securing a valuable lot of logs this summer. The river is actually full of them. Over one million feet have already reached the mill, and between three and four million feet are on the way down.[68]

Exhibit 133 advises of a suit brought in 1900 against the Spokane and Idaho Lumber Company for violation of federal statutes prohibiting pollution of navigable waterways. According to the article, the U.S. Marshall in the case

found that the Spokane River was a navigable stream.[69]

Exhibit 128 reports another case, *Spokane Mill Co. v. Post et al.*, 50 F. 429 (D. Idaho 1892), where a Spokane mill operator sued the owner of the Post Falls Dam, seeking to enjoin obstruction of the river. The operator's logs had apparently gathered at defendant's dam and were unable to pass. The court refused to grant the equitable remedy of injunction, but noted, in dicta, that the facts "indicate that the Spokane river is of sufficient size and of such a channel as to be held a public highway."[70]

Exhibit 87 is a 1932 report by the Corps of Engineers (Corps) accessing the navigability of the Spokane River. Among other things, the report acknowledges log flotation "from the lake to Post Falls, and to points below in the very early days of settlement in Spokane."[71] Interest-

ingly, this report also quotes the following passage from a 1905 letter:

> There was only one boat ever made the trip from Spokane to Coeur d'Alene was hauled out of the river here and transported by the team over the dam. In high water small steamers can make between Spokane and Post Falls, but as there is no trade no one does it.[72]

In a public notice dated June 18, 1957, the Corps apparently advised all concerned that the Spokane River was navigable as far as Little Falls Dam. *See* Exhibit 131. And, in a 1975 letter to the Spokane Tribal Chairman, the Corps expressed its view that "[t]he Spokane River is currently considered a navigable waterway of the United States from its mouth to Little Falls Dam at river mile 29.3."[73]

Exhibit 125 shows that in 1875 the Legislative Assembly for the Territory of Washington passed a law declaring the

Spokane to be "navigable and a public highway from its mouth to the point where it is crossed by the line dividing Idaho and Washington Territories, for the purpose of rafting, driving and floating logs, timber and other material."[74] WWPC challenges this particular exhibit as "incompetent evidence"[75] which "cannot create a navigable waterway of the United States from a stream which is not navigable in fact."[76] While it is true that, standing alone, the statute would not compel a finding of navigability, it nonetheless suggests the river's suitability for the prescribed purposes.

WWPC seems to concede that all of the foregoing evidence would support a finding of navigability over the Spokane River, but only for the stretch between Lake Coeur d'Alene and Spokane Falls. WWPC argues that no competent evidence of navigation below Spokane Falls is in this

record. Relying exclusively on the Corps' conclusion in its 1932 report (Exhibit 87, p. 4) that the Spokane River is not a navigable stream of the United States, WWPC believes the evidence demonstrated that the River is not navigable.

First, it should be noted that the evidence disclosed logging activity as far as the Little Falls Dam which is well below Spokane Falls. *See e.g.*, Exhibits 103 & 131. If the river is navigable above the Little Falls Dam, it is, for jurisdictional purposes, navigable below. *Rochester Gas and Electric Corp. v. F.P.C., supra* at 595 (citations). Indeed, it would be reversible error to limit our focus to a particular part of the river. *Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Company, supra,* mimeo at p. 33. And, contrary to WWPC's claim, there is evidence of past navigation below Little Falls Dam:

> During the winter of 1825-26 three large boats for use on the Columbia River were built at Spokane House. They were forty feet long and constructed of cedar boards of the same length. It was necessary to find cedar trees with long, straight, clear trunks and to saw the log longitudinally (whip-saw)—a tedious process, as two men could produce little more than 100 board feet in a working day. The finished craft were run down the Spokane River in April, when the river was swollen by the spring floods. One of the boats struck a rock and narrowly escaped destruction; the other two came through unscathed.[7]

The Corps' report to Congress in 1938 (Exhibit 104), which weighs the feasibility of improvements to the river below Spokane Falls, suggests that these waters were regarded as within Congress' commerce power. In short, WWPC has ignored all this other evidence of navigability as well as the Corps' statement, subsequent to 1932, that the Spokane River is

considered navigable to Little Falls Dam.[78]

The evidence, taken in its entirety, is sufficient to establish navigability under § 3(8) of the Federal Power Act. The evidence was largely of past use and suitability for use, and the use occurred primarily over the river's stretch from Coeur d'Alene, Idaho into the State of Washington, thus placing it in interstate commerce. It is therefore found that Little Falls Dam is situated on a "navigable water of the United States."

Hydraulic and Electrical Coordination

Another basis suggested for the exercise of Commission licensing jurisdiction over the Little Falls development is its coordinated operation with the other developments of Project No. 2545. The fact that Little Falls operates in a coordinated manner is undisputed. WWPC states on brief that "the Little

Falls development is operated in coordination with the other developments on the Spokane River and is operated in coordination with the other developments owned by the Company and owned by numerous other utility entities, both publicly and privately owned in the Pacific Northwest."[79]

The issue, as framed by the Commission in its order, poses the question whether Commission licensing jurisdiction could properly be asserted on the basis of coordination," *regardless of* the existence of a pre-June 10, 1920 permit or valid right of way."[80] WWPC maintains that this is "purely an issue of law," and cites Section 23 of the Federal Power Act[81] and extensive legislative history in support of the proposition that coordination cannot serve as a basis for the assertion of jurisdiction where there is a claimed pre-1920 permit.

Staff in its brief reviews the evidentiary record, establishing that the Little Falls development operates in a coordinated fashion, and concludes that in light of the complete unit of development standard, the Little Falls development should be licensed as part of Project No. 2545.[82] Staff Counsel does not, however, address the question as posed by the Commission. Counsel for the Secretary and Counsel for the Spokane Tribe, while supporting the licensing of the Little Falls development as an integral part of Project No. 2545, do not meet the Section 23(a) argument advanced by WWPC.

WWPC in its reply brief concedes, on the basis of Sections 3(11), 4(e) and 10(a) of the Federal Power Act and the authorities cited by the parties, that if it were voluntarily applying for a license under Section 23(a) "it would be appropriate to include the Little Falls

Project in the license for Project No. 2545."[83] But it maintains that upon finding that it has a valid pre-1920 permit, the Commission could not, in any event exercise its licensing jurisdiction on the basis of coordination. While WWPC's presentation on this issue is persuasive, the finding herein that WWPC does not have a valid pre-1920 permit makes the resolution thereof unnecessary.

The record as well as the argument of Counsel on this issue are, nevertheless, instructive. As was noted previously, it is clearly established that the Little Falls development is fully coordinated with the other developments of Project No. 2545 as well as with other developments in the Pacific Northwest.

It is also undisputed that the hydraulic and electric coordination in a comprehensive development provides an independent basis upon which the

Commission may exercise its licensing jurisdiction[84] Moreover, the transmission of hydroelectric energy in interstate commerce may also provide a basis for jurisdiction. *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90 (1965), *reh. denied*, 381 U.S. 956 (1965).

In the instant case, it has been shown that the coordinated operation of the Little Falls development with the other developments on the Spokane River render the development a part of an integrated system providing for the comprehensive development of the water power resources of the Spokane River.[85]

In addition to the determination of hydraulic and electrical coordination as a basis for licensing jurisdiction, the evidence and authorities presented on this issue compel the licensing of the Little Falls development as part of Project No.

2545, rather than as an individual project, in any event.

Accordingly, WWPC will be ordered to file an amendment to include the Little Falls development within the License for Project No. 2545.

Additional Findings and Conclusions

Upon consideration of the entire record, including the briefs filed by the parties, it is further found and concluded that:

(1) The Washington Water Power Company is a corporation organized under the laws of the State of Washington and is a licensee of this Commission for Project No. 2545.

(2) The Washington Water Power Company owns, operates and maintains the Little Falls development on the Spokane River.

(3) The Little Falls power site is fully developed. The Little Falls

development is fully coordinated with the developments included in Project No. 2545 and all other hydroelectric facilities covered by the Pacific Northwest Coordination Agreement.

(4) The Little Falls development is a hydroelectric project with an installed capacity of 38 mw situated in and across a reach of the Spokane River that is a navigable water of the United States and thereby warrants the exercise of licensing jurisdiction by the Federal Energy Regulatory Commission.

(5) The Washington Water Power Company operates and maintains the Little Falls Dam in and across the Spokane River, a navigable water of the United States within the State of Washington, together with water conduits a power house, and other works of the Little Falls project incidental to the development of electric power across, along or in the Spokane

River, without having a permit granted prior to June 10, 1920 or a license granted pursuant to the Federal Power Act, in violation of Section 23(b) of the Federal Power Act.

(6) The Washington Water Power should be directed to file for an amendment of its license for Project No. 2545 to include the Little Falls development.

(7) In light of the apparent good faith belief by the Washington Water Power Company that it was in possession of a valid authorization by the Secretary of the Interior for the Little Falls development, and in view of its continuing operation of that development which has provided electric energy to the region for some 70 years, it would not be in the public interest to compel the cessation of operations at the moment it is determined that a license is required.

Order

Wherefore, it is ordered, subject to review by the Commission on appeal, or upon its own motion as provided in the Commission's Rules of Practice and Procedure, that:

(A) Within 90 days of the effective date of this decision, Washington Water Power Company shall file an application pursuant to the Federal Power Act and the Commission's Rules and Regulations thereunder to amend its license for Project No. 2545 to include as part of the project the Little Falls development.

(B) Pending the filing and diligent pursuit in good faith of an amendment of the license of Project No. 2545 to include the Little Falls development, the Washington Water Power Company may continue the operation of the Little Falls development until further order of the Commission.

- Footnotes -

[1] Post Falls is the uppermost development on the Spokane River about nine miles below Coeur d'Alene Lake, Idaho. Little Falls Development is the farthest downstream development on the Spokane River, about 30 miles from where it joins the Columbia River.

[2] Additional unresolved issues involving title to the banks and beds of the Coeur d'Alene Lake will be determined in a subsequent proceeding.

[3] Since the licensing of the Post Falls development is no longer in issue, the issues set forth below are applicable only to the Little Falls development.

[4] *Washington Water Power Company,* Project No. 2545, "Order Providing For Hearing," issued July 20, 1977, mimeo pp. 3-4.

[5] Tr. 366.

[6] *See* § 23b, *The Federal Power Act,* (16 U.S.C. 817)

> (b) It shall be unlawful for any person, State or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam,

except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act.

[7] Exhibit 77.

[8] Exhibit 3 (33 Stat. 1006).

[9] *Id.*, Section 2.

[10] *Id.*

[11] *Id.*, Section 3.

[12] Exhibits 4, 5, 11, & 16.

[13] Exhibit 23.

[14] Exhibit 26.

[15] Exhibit 27.

[16] Exhibits 28 & 29.

[17] Exhibit 34.

[18] Exhibit 28-29.

[19] Exhibit 51.

[20] Tr. 182.

[21] Tr. 185.

[22] Exhibit 56.

[23] Exhibit 57.

[24] Exhibit 59.

[25] Exhibit 68.

[26] Exhibit 69.

[27] Exhibit 73.

[28] Exhibits 74 & 75. In his decision, the Secretary stated: "Inasmuch, therefore, as the Act of 1905 does not expressly or by implication authorize or direct the issuance of a patent, and as the case is one in which said granting Act of 1905, with the approved map, makes a transfer of a limited fee, with an implied reverter, the Department is without authority to issue a patent in the premises. (*Shaw v. Kellogg*, 170 U.S., 312, 342)." (Exhibit 75, p. 7)

[29] Exhibit 77.

[30] WWPC's Initial Brief p. 9.

[31] § 2 of the Act of March 3, 1905 (Exhibit 3).

[32] Exhibit 23.

[33] Exhibit 19.

[34] *See* Exhibits 29 & 54.

[35] Exhibit 29.

[36] Exhibit 23.

[37] Exhibits 25, 28, 29.

[38] Exhibit 69.

[39] Exhibit 63.

[40] Exhibit 76 indicates that WWPC filed an application on April 26, 1923.

[41] Exhibit 73.

[42] Exhibits 81, 82 & 83.

[43] WWPC's Initial Brief p. 9 (bracketed material added).

[44] WWPC's Reply Brief, p. 6.

[45] 74th Cong., 1st Sess., page 47 (May 13, 1935).

[46] 32 Op. Atty. Gen. 525, 528 (1921).

[47] The courts have stated that the passage of the FWPA was illustrative of Congressional intention to centralize federal authority over water power resources in one government agency. *Northwest Paper Co. v. F.P.C.*, 344 F. 2d 47, 51 (CA8—1965).

[48] Section 8 of the Act provides: That no voluntary transfer of any licensee or of the rights thereunder granted, shall be made without written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all conditions of the license under which such rights are held by such licensee and also subject to all provisions and conditions of this Act to the same extent as though such successor as assign were the original licensee hereunder . . . .

[49] Section 29 of the Act provides: That all Acts or parts of Acts inconsistent with this Act are hereby repealed . . . .

[50] Section 23(a) of the Act, (16 U.S.C. § 816) preserves the rights granted prior to June 10, 1920, to the legal holders of such rights with the passage of the FWPA. All inconsistent acts were repealed, such as those provisions of the Act of February 1, 1905 (33 Stat. 628), relating to hydroelectric developments, including any provisions relating to transfers. *See* 32 Op. Atty. Gen., *supra.*

[51] *Big Bend* at 472.

[52] The approved resurvey map resulted in an amendment of the Wilson grant.

[53] Having determined that WWPC does not possess a valid pre-June 10, 1920 permit, Staff's further contention that WWPC should have obtained a permit to occupy navigable waters from the Secretary of War pursuant to the River and Harbor Act of 1899 (33 U.S.C. 401 *et seq.*), is not reached and, therefore, need not be addressed.

[54] Staff urges that upon a finding that WWPC does not have a valid pre-1920 permit to use all of the lands occupied by the development within the Spokane Indian Reservation an additional basis under Section 23(b) for the assertion of Commission jurisdiction would be WWPC's occupancy of lands within a reservation as defined by Section 3(2) of the Federal Power Act (16 U.S.C. 796(2)). Since either navigability or hydraulic and electrical coordination provide an adequate ground for the assertion of Commission jurisdiction, it is unnecessary to explore the further basis suggested by Staff on brief.

[55] 16 U.S.C. 796(8).

[56] *United States v. The Daniel Ball*, 77 U.S. 557, 563 (1871) (10 Wall.).

[57] *United States v. The Montello*, 87 U.S. 430, 441 (1874) (20 Wall.); *United States v. Utah*, 283 U.S. 64 (1931).

[58] *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406-408 (1940).

[59] *United States v. Appalachian Electric Power Co., supra* note 58 at 408-410 (citations omitted).

[60] *Supra* note 56.

[61] *Supra* note 57.

[62] WWPC's Reply Br. pp. 18-19.

[63] *Leovy v. United States*, 177 U.S. 621, 632 (1900).

[64] Citing *Montana Power Company v. F.P.C.*, 185 F. 2d 491, 494-95 (CADC-1950), *cert. denied*, 340 U.S. 947 (1951); *Georgia Power Company v. F.P.C.*, 152 F. 2d 908, 912-13 (CA5—1946); *State of Wisconsin v. F.P.C.*, 214 F. 2d 334, 337-38 (CA7—1954), *cert. denied*, 348 U.S. 883 (1954).

[65] Exhibits 87, 129 p. 3 & 130.

[66] Exhibit 126 p. 4 [El Hult, R. Steamboats In The Timber 88 (1952)].

[67] Brier, *Sawdust Empire* 181 (1958).

[68] Exhibit 129 p. 2 [*Spokane Falls Evening Review,* Vol. I No. 26, July 10, 1884].

[69] *American Lumberman,* August 25, 1900.

[70] Exhibit 128 p. 6 [*Spokane Mill Co. v. Post et al.*, 50 F. 429, 433 (D. Idaho 1892).]

[71] Exhibit 87 p. 2 [Sturdevant & Robins, *Report on Navigability of Spokane River, Washington and Idaho,* April 29, 1932.]

[72] *Id.* at p. 3.

[73] Exhibit 103, p. 1.

[74] Exhibit 125, p. 3.

[75] WWPC's Initial Brief, p. 20.

[76] WWPC's Reply Brief, p. 18 (citations omitted).

[77] Exhibits 158 p. 5 [Kingston, *Spokane House State Park In Retrospect,* 39 PAC. N.W.Q. 191 (July 1948) (citing Elliot, *Journal of John Work,* 5 W.H.Q. 283 (October 1914))]; *see also* Exhibit 157 p. 5.

[78] Exhibits 103 & 131.

[79] WWPC's Initial brief, p. 26.

[80] *Supra* note 4.

[81] Section 23(a) provides:

> The provision of this Part shall not be construed as affecting any permit or valid existing right of way heretofore granted or as confirming or otherwise affecting any claim or as affecting any authority heretofore given pursuant to law, . . .

[82] Citing, *Pacific Gas and Electric Co.*, 2 FPC 516 (1941), *Montana Power Co.*, 7 FPC 163 (1948), *Montana Power Co.*, 15 FPC 1330, 1335 (1956), *Georgia Power Co.*, 37 FPC 620 (1967), *California Oregon Power Co.*, 23 FPC 59, 63 (1960), *Niagara Mohawk Power Corp.*, Project No. 2645, (order issued July 3, 1978, 4 FERC ¶ —) and *Pacific Gas and Electric Co.*, 29 FPC 1265, 1266 (1963).

[83] WWPC Reply Brief, p. 28.

[84] Section 10(a) Federal Power Act.

[85] *See generally* note 82, *supra.*

15 FERC ¶ 61,039

The Washington Water Power Company, Project No. 2545

Opinion No. 117; Opinion and Order Affirming, with Modifications, the Initial Decision on Jurisdiction

(Issued April 8, 1981)

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr., George R. Hall and J. David Hughes.

[Note: Initial Decision determining Commission jurisdiction over hydroelectric development was issued April 1, 1980 and appears at 11 FERC ¶ 63,001.]

Appearances

Jerry K. Boyd, Alan P. O'Kelly, Lee S. Sherline, and *Peyton G. Bowman, III* on behalf of the Washington Water Power Company.

Robert D. Dellwo and *Gary T. Farrell* on behalf of the Coeur d'Alene and Spokane Indian Tribes.

Charles E. O'Connell, Jr. on behalf of the Secretary of the Interior.

Linda Lee and *Peter Lesch* on behalf of the Staff, Federal Energy Regulatory Commission.

[Opinion No. 117 Text]

The Washington Water Power Company (WWPC), contends herein that it is authorized by a permit or permits granted prior to June 10, 1920, the date of the Federal Water Power Act (FWPA), to continue to operate and maintain its Little Falls hydroelectric development on the Spokane River in the State of Washington. We find that WWPC has authority under one such permit to utilize lands of the Spokane Indian Reservation and waters on the reservation side of the river for that purpose, but we also find that its authority thereunder is insufficient for the continued operation and maintenance of that development other than under and in accordance with the terms of a license granted pursuant to the Federal Power Act (FPA).[1] Since the parties agree that the Little Falls development should be licensed, if at all,

as part of WWPC's Project No. 2545, and since that development is coordinated with the other developments of that licensed project, we affirm with certain modifications the Initial Decision issued herein on April 1, 1980, requiring WWPC to file an application to amend its license for Project No. 2545 to include the Little Falls development.

As more fully discussed herein, the Secretary of the Interior (Interior), in 1906, granted David Wilson (Wilson) under the Act of March 3, 1905, the right to utilize waters of the Spokane River and 100 acres of the Spokane Indian Reservation at Little Falls for the development of water power. In 1907 Wilson transferred those rights to WWPC without first obtaining Interior's permission. In 1908 Interior granted WWPC under the Act of March 3, 1905, the right to utilize waters of the Spokane River and 8 addi-

tional acres of the Spokane Indian Reservation at Little Falls for the development of water power. In 1910 WWPC completed its water power development utilizing the 108 acres. And in 1924, after the FWPA was enacted, WWPC obtained a patent from Interior for the 108 acres.

In order to resolve the ultimate question of whether WWPC is required to license the continued operation and maintenance of its Little Falls water power development, it is necessary to consider, first, the nature and extent of the pre-FWPA authorization that will substitute for a current license under the FPA to continue to operate and maintain a hydro-electric development. And it is necessary to consider, second, the nature of such authorization held by WWPC under the Act of March 3, 1905.

Section 23(b) of the Federal Power Act

Our analysis begins with the first sentence of Section 23(b) of the FPA, which was enacted in 1935[2] and states:

> It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act.

The first sentence of Section 23(b) was derived principally from and generally parallels the wording of the licensing authority of the Commission[3] under Section 4(d) of the FWPA, which became Section

4(e) of the FPA.[4] It was also derived in part from the first paragraph of Section 23 of the FWPA, which became Section 23(a) of the FPA. The interaction of these provisions goes to the roofs of the FWPA and, consequently, Part I of the FPA.

The principal purpose of the FWPA was to establish a national policy to promote the comprehensive development of water power on government lands and navigable waters other than by the government itself, and to administer that policy by abolishing the piecemeal authorities of the Secretaries of Agriculture, the Interior and War over the nation's hydroelectric resources and centralizing them in the Federal Power Commission.[5]

The national policy was centralized in the Commission through the authority in Section 4(d) to issue licenses for the purpose of constructing, operating and maintaining works necessary or convenient

for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States. And the piecemeal authorities of the Secretaries were abolished by Section 29 which provided that all inconsistent acts and parts of acts were repealed.[6]

While the FWPA repealed inconsistent laws, it provided in the first paragraph of Section 23 that the FWPA

> shall not be construed as affecting any permit or valid existing right of way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder, and upon such application the commission may issue to any such applicant a license in accordance with the

> provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder . . . .

The FWPA thus provided an option for those who, on June 10, 1920, had authority to utilize government lands and navigable waters for the development of water power.[7] They could continue to utilize

Congress transformed the FWPA into Part I of the FPA in 1935 and made compliance mandatory by enacting the first sentence of Section 23(b) stating that it shall be unlawful to engage in the activities that the Commission licenses "except under and in accordance with" proper authorization. Congress limited that authorization to (1) a license granted pursuant to the FPA or, (2) in the light of Section 23(a) pertaining to authority existing on June 10, 1920, "a permit or valid existing right-of-way granted prior to" that date.

The first sentence of Section 23(b) prohibits the construction, operation, or maintenance of water power developments utilizing "navigable waters" or any part of the "public lands" or "reservations" of the United States, without proper authorization. It is apparent that no authorization is required if the continued

operation and maintenance of the Little Falls development does not require WWPC to engage in any of the activities specified in Section 23(b) as requiring licensing. The threshold inquiry, therefore, is whether any of the quoted bases for the licensing requirement exist.

WWPC states, in this connection, in its brief on exceptions, that it "does not take exception to a finding that the Spokane River constitutes navigable water as defined in Section 3(8) of the Federal Power Act." Since our concern herein with respect to the navigability of the Spokane River pertains only to navigability within the purview of the term "navigable waters" as defined in the FWPA/FPA, WWPC is deemed to have waived any further objections to navigability. 18 CFR § 1.31(c). Furthermore, as discussed under "The Act of March 3, 1905", *infra*, we have concluded that the Little Falls development is

constructed in part on "reservations" of the United States within the purview of the FWPA/FPA. Accordingly, we find that the continued operation and maintenance of the Little Falls development requires proper authorization, either in the form of a license granted pursuant to the FPA, or a permit or valid existing right-of-way granted prior to June 10, 1920.

The first sentence of Section 23(b) is instructive as to the nature and extent of the pre-FWPA authorization that will suffice in lieu of a license. It prohibits the utilization of navigable waters and the construction of dams in navigable waters for the development of power, authorization for which was formerly vested in the Secretary of War.' And it prohibits the utilization of public lands and reservations of the United States for the development of power, authorization for which was formerly vested in the

Secretaries of Agriculture and the Interior, depending on which Secretary had jurisdiction over particular public lands or reservations. In other words, we look toward the former piecemeal authorities of the three Secretaries that were centralized in the Commission.

The first sentence of Section 23(b) indicates that the pre-FWPA authorization must cover *all* of the jurisdictional activities that are prohibited by it in the absence of such authorization or a license. If both a "reservation" and "navigable waters" of the United States are utilized to develop electric power, authority to utilize both must co-exist.[10] If there is authority to utilize the "reservation" but not the "navigable waters", the operation and maintenance of a power development without a license would be unlawful under Section 23(b) to the extent that "navigable waters" are

utilized. So, too, if there is authority to utilize only part of a "reservation" used for a power development, the operation and maintenance of the power development on the other part of the "reservation" would be unlawful under Section 23(b) without a license. And pre-FWPA Federal authorization to utilize navigable waters, without similar authorization to operate and maintain a dam in those waters, would be unlawful under Section 23(b) in the absence of a license.

We emphasize, in this connection, that the question is not whether authorization was required under the superseded statutes. That is irrelevant. The question is whether a specific jurisdictional activity is now prohibited by the first sentence of Section 23(b) in the absence of authorization, and, if so, whether authorization to engage in all

such activities co-existed on June 10, 1920, the date chosen by Congress in 1935 to coincide with the date of the FWPA. The stated purpose of that provision was to bring under the Commission's jurisdiction all hydro-electric developments with which the United States has any valid concern.[11] With the centralization of the piecemeal authorities in the Commission, it is apparent that pre-FWPA permittees with authority to engage in only some of the activities that are prohibited by the first sentence of Section 23(b), must be required to obtain licenses if that provision is to be obeyed. Otherwise, they would be allowed to violate that provision.[12]

Finally, the first sentence of Section 23(b) prohibits the specified jurisdictional activities "except under and in accordance with the terms of a permit" granted prior to June 10, 1920, or

a license. While an assignee of a permit might arguably operate and maintain a water power development "in accordance with" its terms, only the named recipient would be able to operate the development "under" the permit. That named recipient could be the original grantee, or the assignee of the original grantee upon the issuance of another permit. We emphasize, in this connection, that the question is not whether transfer was required under the superseded statutes and regulations. The question is whether one claiming pre-FWPA authorization is able to engage in the prohibited activities "under and in accordance with the terms" of a pre- FWPA permit or right-of-way.

Interior did not issue formal permits under the Act of March 3, 1905, containing a variety of terms, as such. As shown by Exhibit 49, for example, Interior endorsed approvals on (1) Office of Indian Affairs

letters transmitting, and recommending approval of, applications for permits and (2) the accompanying maps.[13] Applications for permits under the Act of March 3, 1905, contained representations that were intended to satisfy the Secretary of the Interior, as required by that Act, that the applications were made "in good faith and with intent and ability to use" the lands granted thereunder for the purposes specified in that Act. Those representations were personal to the applicants and, under such circumstances, we would construe the phrase in Section 23(b) "terms of a permit . . . granted prior to June 10, 1920" as including those personal representations. Accordingly, we conclude that only the named recipients of the permits can operate and maintain water power developments "under and in accordance with" the terms of those permits. Conversely, we conclude that an

assignee who has not effected a transfer of the permit to the assignee's name cannot operate and maintain a water power development "under and in accordance with" its terms within the purview of Section 23(b).[14]

We turn next to "The Act of March 3, 1905" pursuant to which WWPC claims authority under a permit or permits granted prior to June 10, 1920.

The Act of March 3, 1905

David Wilson, who owned land on the south bank of the Spokane River at Little Falls, wanted to obtain an interest in land within the Spokane Indian Reservation on the north bank, and the right to utilize the Spokane River, for the construction and operation of a water power development. He could have obtained a license for the use of the land under the Act of February 15, 1901 (31 Stat. 790), which was applicable to public lands

and reservations generally, but such a license was revocable at the discretion of Interior and did not include the use of the water. Wilson was unwilling to invest in a water power development under such circumstances and, as a result, he and another individual caused Congressman Jones of Washington to sponsor a bill that became the Act of March 3, 1905 (33 Stat. 1006).

That Act empowered the Secretary of the Interior to permit citizens, associations and corporations of the United States to acquire "the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation . . . by appropriation under and pursuant to the laws of the State of Washington."[15] It also empowered Interior to grant such appropriator or appropriators lands within the Spokane Indian Reservation for the erection of

structures for the development of power or for the beneficial use of the water.[16] Interior adopted regulations for the administration of the Act, but the parties to this proceeding were unable to obtain a copy for the record.[17]

The Acting Commissioner of Indian Affairs reported on the bill that became the Act of March 3, 1905, in a letter dated December 17, 1904, to the Chairman of the Committee on Indian Affairs of the House of Representatives. That letter is printed in House Report No. 4006 and Senate Report No. 4378, 58th Congress, 3rd Session, and explains "that an individual or corporation proposing the expenditure of large sums of money for purposes specified in this bill should be granted the perpetual use of the land upon which such expenditures are to be made." Congressman Jones explained to the House when the bill was passed:

> There is a law enabling companies to secure permits or licenses; but of course they would not want to expend large sums of money on a mere license or permit, so this bill authorizes the acquirement of title to this land. . . .
>
> * * *
>
> It simply affects Indian lands and provides means by which persons can acquire the permanent rights.

In the course of the debate on the House floor, Congressman Jones was asked whether the bill carried the right to dam the Spokane River. And he replied (page 2413 of the Congressional Record),

> Oh, no; not at all. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.[18]

There is considerable controversy in this proceeding with respect to the nature of the interests in the lands of the Spokane Indian Reservation granted under the Act of March 3, 1905. While the

Spokane Indian Tribe has asserted a constitutional challenge to WWPC's title under that Act,[19] the presiding judge has said that WWPC's title is not in issue. WWPC contends in its brief on exceptions (1) that it acquired "all federal right, title and interest to the water power and property of the Little Falls development", (2) that the judge decided that it has no title, (3) that the Commission cannot determine its title, and (4) that the government is estopped from challenging its title.

We agree with the presiding judge that it is not necessary to resolve the constitutional challenge to WWPC's title under the Act of March 3, 1905, to determine whether the Little Falls development is required to be licensed under the FPA. If the lands of the Spokane Indian Reservation were granted in fee simple[20] under the Act of March 3, 1905,

they would have ceased being part of that reservation and would no longer have been "reservations" within the purview of Section 3(2) of the FPA,[21] because the United States would not have retained any property interest in them. Accordingly, the continued operation and maintenance of the Little Falls development on those lands would not today be prohibited (without authorization) by reason of that development's utilizing "reservations" of the United States. If, on the other hand, those lands were granted in less than fee simple, as we find, *infra*, (or if the grants are void, which issue is not reached), the United States continues to have a reserved interest in them, they continue to be "reservations" within the purview of Section 3(2), and the continued operation and maintenance of the Little Falls development is prohibited (without

authorization) by reason of its utilizing "reservations" of the United States.

While ordinarily the Commission does not determine issues associated with title to lands, the Commission can and will do so to the extent necessary to administer the FPA. *See Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), wherein the Commission determined whether Indian lands were "reservations" within the purview of Section 3(2) for the purpose of determining whether it would be required to make a finding pursuant to Section 4(e) that the license in question would "not interfere or be inconsistent with the purpose for which such reservation was created or acquired."[22]

The Act of March 3, 1905, is itself the best evidence of the nature of WWPC's title. It empowered Interior to grant land on the Spokane Indian Reservation "whether the same has been allotted in severalty to

any individual Indians, but which has not been conveyed to the allottee with full power of alienation." It appears, therefore, that the persons who drafted that statute were aware of the principal attribute of a fee simple title, which is the full power of alienation, and chose appropriate language to express that attribute to those who would administer or otherwise be interested in the statute. Obviously, Congress could not empower Interior to grant lands within the boundaries of the Spokane Indian Reservation that had already been conveyed to Indians in fee simple. While Interior was expressly prohibited from granting lands that had already been granted with full power of alienation, *Interior was not expressly empowered to make grants with full power of alienation*. Indeed, when Interior ultimately issued a patent in 1924[23] (Exhibit 77), it was in the nature

of quit claim deed as distinguished from a warranty deed in fee simple. The patent recites that the land was granted "to the extent and for the purposes that the Secretary of the Interior is authorized to grant the same under the said act of March 3, 1905 . . ."

The Act of March 3, 1905, empowered Interior to grant lands "such as shall be necessary and requisite . . . for the development of power or for the beneficial use of said water . . ." While the Acting Commissioner of Indian Affairs interpreted the language as granting "the perpetual use of the land", thus suggesting an interest less than a fee simple, Congressman Jones explained that the bill authorized the "acquirement of title" or "permanent rights" rather than a "mere license or permit", which also seems to fall short of a fee simple.

In a letter dated May 5, 1909, to the Assistant Commissioner of Indian Affairs (Exhibit 56), WWPC requested confirmation of its view that a grant under the Act of March 3, 1905, "is an outright sale and conveyance of title and not in the nature of a limited easement, and will only be revocable for non-user." The Acting Commissioner replied on May 8, 1909 (Exhibit 57), that a grant gives "a full and permanent title, revocable only for non-user." If the interest granted is terminable for non-use, as they agreed, it is less than a fee simple, and leaves a reserved interest in the United States. Therefore, WWPC would not have "all federal right, title and interest," as claimed in its brief.

In *United States v. Big Bend Transit Co.*, 42 F.Supp. 459 (E.D.Wash. 1941), the United States District Court for the Eastern District of Washington discussed

the nature of the title granted under the Act of March 3, 1905, stating at 472,

> The defendant [grantee] is claiming here that on December 9, 1939, it had what the Secretary [of the Interior] on May 10, 1923, declared it had; i.e., "a *limited fee on an implied condition of reverter* in the event the grantee ceases to use of retain the land for the purpose indicated in the Act of 1905, the termination of which right of way or limited fee is not vested in the Secretary of the Interior but may be effected upon good cause shown only through proceedings had without the jurisdiction of the Department of the Interior." To my mind, that administrative interpretation of that Act is the only reasonable and proper interpretation [Emphasis added.]

And to our minds, that administrative and judicial interpretation is the only reasonable and proper one. We find, therefore, that the United States has an interest in the lands granted under the Act of March 3, 1905, such that they remain "reservations" of the United States

within the purview of Section 3(2) of the FPA.

We would note, in this connection, that we are not attacking WWPC's title collaterally and impermissibly. In *Big Bend, supra*, the United States sought to condemn lands under the Reclamation Act of 1902 that had been granted under the Act of March 3, 1905, but had not been used for the development of electric power, and wanted to pay nothing for those lands on the ground, among others, that the grantee no longer had any power rights in 1939 when the condemnation proceeding was started. The Court found (42 F.Supp., at 473) that the grantee had spent a large sum of money in reliance upon the 1923 Interior interpretation that its grant was still valid and, therefore, the United States

> cannot here in this proceeding brought as a consequence of the Fifth Amendment to the

> Constitution which requires the payment of just compensation for private property taken for public use, set aside the right of the defendant without compensation therefor. [Citation omitted.] This would amount to a collateral attack on the title acquired by defendant. Such an attack is not permissible. [Citations omitted.]

Here, we are not saying that WWPC has anything less than WWPC itself claimed it had as far back as 1909. We are not taking any private property for public use without the payment of just compensation. We are saying, simply, that the nature of WWPC's title is such that the United States also has an interest that comes within the definition of the term "reservations". And we are so deciding for the purpose of determining whether WWPC's continued operation and maintenance of its Little Falls hydro-electric development within the physical boundaries of the lands granted under the Act of March 3,

1905, is required to be licensed under the FPA. If WWPC obtains entirely new authority under the FPA to continue to operate and maintain that development, including its interest in lands and its water rights at Little Falls, Sections 14(a) and 15(a) of the FPA will require the payment of WWPC's "net investment . . . not to exceed . . . fair value" if that development is taken over by the United States or licensed to another, or "just compensation" if the development is condemned by the United States, the State of Washington or a municipality.

The constitutional objections raised by WWPC with respect to licensing the Little Falls development were addressed by the Supreme Court in *United States v. Appalachian* Electric Power Co., 311 U.S. 377 (1940), at 424 (footnote omitted):

> . . . This power of Congress to regulate commerce is so unfettered that its judgment as

> to whether a structure is or is not a hindrance is conclusive . . ..
>
> Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised through § 9 of the Rivers and Harbors Act of 1899 [33 U.S.C. § 401] prohibiting construction without Congressional consent and through § 4(e) of the present Power Act.

The Supreme Court held, at 427 (footnote omitted),

> The respondent urges that as riparian owner with state approval of its plans, it is entitled to freedom in the development of its property and particularly cannot be compelled to submit to the acquisition clause with a price fixed at less than a fair value, in the eminent domain sense, at the time of taking. Such a taking, it is contended, would violate the Fifth Amendment. It is now a question whether the Government in taking over the property may do so at less than a fair value.

> It has been shown . . . that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build a dam, it would have to pay the fair value, judicially determined, for the fast land; nothing for the water power. We assume without deciding that by compulsion of the method of acquisition provided in § 14 of the Power Act and the tendered license, these riparian rights may pass to the United States for less than their fair value. *In our view this "is the price which [respondents] must pay to secure the right to maintain their dam."* The quoted words are the conclusion of the opinion in *Fox River* Co. v. Railroad Commission [274 U.S. 651]. The case is decisive on the issue of confiscation. . . The fact that the *Fox River* case involved a state and that this case involves the United States is immaterial from the due process standpoint . . . [Emphasis added].

On the authority of *Appalachian*, we find that the fact that WWPC derives its authority from an act of Congress rather than from State law, as in *Appalachian* and

Fox River, is immaterial from the due process standpoint. We find no merit in the constitutional objections of WWPC.

We turn, next, to the extent of WWPC's authority under its permit or permits granted prior to June 10, 1920.

WWPC'S Limited Authority

Shortly after March 3, 1905, Wilson appropriated a flow of 10,000 cubic feet per second (cfs) at Little Falls pursuant to the laws of the State of Washington and applied under the Act of March 3, 1905, to acquire the right to use the waters of the Spokane River at the point of his appropriation and to purchase 100 acres of the Spokane Indian Reservation on the north bank. By letter dated November 3, 1906, the Secretary of the Interior granted the 100 acres and the right to use the waters, and approved Wilson's application.[24]

On July 8, 1907, Wilson sold his interests in the lands and water rights to

WWPC, and in 1908 the latter began to construct its hydro-electric development, including a dam, at Little Falls, without first submitting its plans to the Chief of Engineers and the Secretary of War and obtaining their approval[25] under Section 9 (pertaining to dams) or 10 (pertaining to obstructions) of the Rivers and Harbors Appropriation Act of 1899 (30 Stat. 1151, now 33 U.S.C. §§ 401 and 403).[26]

WWPC developed Little Falls on the opposite side of the river than contemplated by Wilson and thus utilized lands of the Spokane Indian Reservation that were not included in the interests assigned to it by Wilson. Accordingly, WWPC appropriated a flow of 10,000 cfs pursuant to the laws of the State of Washington and, on May 18, 1908, applied under the Act of March 3, 1905, to acquire the right to use the waters of the Spokane River at the point of its appropriation

and to purchase 8 acres of reservation lands at the same point. The application stated that WWPC had acquired the interests granted by Interior to Wilson on November 3, 1906, and included a copy of the pertinent documents. By letter dated August 28, 1908, the Commissioner of Indian Affairs recommended that the Secretary of the Interior approve the application, stating, among other matters,

> The company in the development of the water-power site purchased from Mr. Wilson has found it necessary to acquire the eight acres under consideration to provide a spillway for the works it is now constructing.

And on August 29, 1908, an Assistant Secretary endorsed his approval.[27]

The Wilson grant that was sold to WWPC was resurveyed jointly by Interior and WWPC in the early part of 1909, and in July 1909 WWPC filed an application under the Act of March 3, 1905, (Exhibit 59, at

6) "solely for the purpose of correcting errors made in the original survey, and placing the line where permanent monuments can readily be established." By letter dated January 24, 1910, the Commissioner of Indian Affairs recommended that the Secretary of the Interior approve the application, and on May 6, 1910, the First Assistant Secretary endorsed his approval.

WWPC completed its Little Falls development in 1910, bringing the hydraulic capacity of the development up to 7,200 cfs.

With respect to the use of waters, we find and conclude that WWPC has a right to utilize 10,000 cfs of the flow of the Spokane River at Little Falls for the development of water power, and that its right includes a permit granted on August 29, 1908, under which WWPC is authorized to so utilize the flow on the reservation side of the river.[28] Since the Little

Falls development has a hydraulic capacity of 7,200 cfs, WWPC is able to operate and maintain the development *under and in accordance with the terms* of the permit insofar as those terms relate to the flow on the reservation side of the river.[29]

From the legislative history of the Act of March 3, 1905, we also find and conclude that the terms of WWPC's permit granted pursuant to its provisions on August 29, 1908, do not include authority to operate and maintain a dam in the Spokane River at Little Falls. The fact that Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899 might not have required authorization for construction of the dam and obstruction of the river is irrelevant.[30] The plenary power of Congress to exclude structures from navigable waters, discussed in *Appalachian*, *supra*, is so unfettered that Congress certainly had the power in 1935

to enact a law that would preclude the continued operation and maintenance of existing power dams in navigable waters except under and in accordance with licenses granted by the Commission, whether or not authorization of the construction of those dams or the obstruction of those waters was required by prior or existing law. Congress did just that in the first sentence of Section 23(b) of the FPA,[31] except that Congress also said that licenses would not be required if, on June 10, 1920, the dams were authorized under prior or existing law, and all other authorizations required by the FPA co-existed.[32] Accordingly, WWPC is not able to operate and maintain its Little Falls development under and in accordance with the terms its permit granted August 29, 1908, insofar as those terms relate to its power dam in the Spokane River.

WWPC does not claim to have authority to operate and maintain its power dam at Little Falls under any permits granted prior to June 10, 1920, other than pursuant to the Act of March 3, 1905. Accordingly, we conclude that WWPC is required by the first sentence of Section 23(b) either to cease operating that dam, or to obtain a license under the FPA for the continued operation and maintenance of its Little Falls development, including that dam.

Turning to the matter of "reservations", we find that WWPC has a permit that was granted on August 29, 1908, under which it is authorized to utilize 8 acres of the lands of the Spokane Indian Reservation at Little Falls for the development of water power. Accordingly, WWPC is able to operate and maintain its Little Falls development under and in accordance with the terms of

that permit insofar as involves the 8 acres.

We also find, for the reasons discussed below, that WWPC is able to operate and maintain that development under and in accordance with the terms of the same permit insofar as involves the 100 acres that were granted to Wilson on November 3, 1906, and assigned to WWPC on July 8, 1907.

As concluded earlier, an assignee of a permit that is personal to the permittee, such as permits granted under the Act of March 3, 1905, who has not effected a transfer of the permit to the assignee's name, cannot operate and maintain a water power development "under and in accordance with" its terms within the purview of Section 23(b). It is clear that neither Wilson nor WWPC specifically sought a transfer by Interior of the interests under the Wilson grant, and that

Interior did not specifically authorize such a transfer, at least prior to June 10, 1920. The absence from the record of a copy of an application for transfer suggests that none exists. And while Interior's 1924 patent recites that Interior approved Wilson's application on a specific date, namely, November 3, 1906, and WWPC's application on a specific date, namely, August 29, 1908, it also recites that the assignment from Wilson to WWPC "was approved and recognized by the Secretary of the Interior", without specifying the date of such action.

Nonetheless, WWPC informed Interior of the assignment. And the Assistant Secretary who endorsed his approval of WWPC's application on August 29, 1908, must be held to have clearly understood that the 8 acres were being utilized for a power development in conjunction with the 100 acres that were previously granted to

Wilson. WWPC made the necessary representations in its application and attached a copy of its financial statement, and the Assistant Secretary obviously satisfied himself that *WWPC* made the application in good faith and with intent and ability to use the lands for the purposes specified in the Act of March 3, 1905. While there was no application specifically for a transfer of the Wilson interests to WWPC, there can be no doubt that on August 29, 1908, Interior approved WWPC's utilization of the entire 108 acre tract for a water power development. Even though Interior's regulations under the Act of March 3, 1905, did not require formal approval of the transfer,[33] as such, we find and conclude, as indicated, that WWPC is able to operate and maintain its Little Falls development under and in accordance with the terms of the permit

that was granted on August 29, 1908, insofar as involves the 100 acres.[34]

Having determined that WWPC is required to file an application to amend its license for Project No. 2545 to include the Little Falls development, we turn to WWPC's option under Section 23(a) to continue to operate and maintain that development to the extent of its authority under the permit granted by Interior on August 29, 1908, under the Act of March 3, 1905, or to obtain entirely new authority under the FPA. WWPC should indicate its choice in its application for the license amendment.

All or part of the 108 acres and WWPC's fee simple lands, the use and occupancy of which are necessary or appropriate in the maintenance and operation of the Little Falls development, should be included within the project boundary to the extent required by the

Commission's Regulations under the FPA. Similarly, the right to utilize 10,000 cfs of the flow of the Spokane River, which is necessary or appropriate in the operation of the development, should be included within the license. The 108 acres, or the part thereof within the project boundary, and the 10,000 cfs, (1) will be subject to the burdens of project lands and waters generally, but not entirely, if WWPC chooses to continue to use its existing authority in part, or (2) will be subject to all project burdens if WWPC chooses to obtain entirely new authority.

If WWPC chooses to continue to use its existing authority under its pre-FWPA permit, then, as provided by Section 23(a), the provisions of Part I of the FPA may not be construed as affecting that permit or the authority thereunder. In that case, while the 108 acres, or the part thereof within the project boundary,

and the 10,000 cfs, will be subject to the burdens of project lands and waters generally, we construe Section 23(a) as prohibiting any such burdens that are inconsistent with the terms of the pre-FWPA permit, as follows:

First, Section 10(e) of the FPA requires the Commission to fix annual charges for the purpose of (1) reimbursing the United States for the costs of administering Part I of the FPA, and (2) recompensing the United States for the use, occupancy and enjoyment of its lands or other property. The payment of annual charges for administering Part I of the FPA is a burden of the license, as distinguished from a burden of project lands and waters. It is part of the price to be paid for the privilege of operating and maintaining the power dam in the Spokane River, and is properly payable by WWPC as being not inconsistent with the

terms of its pre-FWPA permit. But, as discussed earlier, we perceive WWPC's interest in the 108 acres as a right to use, occupy and enjoy those lands for the development of water power, indefinitely, as long as they are so used. While the United States has a reserved interest in those lands, it does not have the present right of possession. Nor can the Commission grant WWPC the present right of possession under the FPA if WWPC chooses not to surrender its permit voluntarily, for such action would be prohibited by Section 23(a) as affecting the authority granted under the Act of March 3, 1905. The payment of annual charges for the use, occupancy and enjoyment of project lands that WWPC has an existing right to use, occupy and enjoy for the development of water power under the terms of its pre-FWPA permit, is a burden of project lands that is not properly imposed on WWPC

as being inconsistent with the terms of that permit.[35] On the other hand, a recreational plan is an example of a burden of project lands and waters that is properly imposed as being not inconsistent with the terms of that permit.

And second, we perceive WWPC's interest in the 108 acres and its right to utilize the 10,000 cfs as property rights for which WWPC is entitled to just compensation upon condemnation. To the extent that Sections 14(a) and 15(a) of the FPA would provide for lesser compensation under the net investment formula if in the future the Little Falls development is taken over by the United States or relicensed to another, that would be a burden of project lands and waters that is not properly imposed on WWPC as being inconsistent with the terms of its permit.

In summary, WWPC is required by Section 23(b) to license the continued operation and maintenance of its Little Falls development. But the Commission is required by Section 23(a) to leave unaffected the permit that Interior granted WWPC on August 29, 1908, by protecting the property rights incident thereto. WWPC may in the future be able to show in specific situations that Part I of the FPA is inconsistent with other protected property rights. But, absent such a showing, the Little Falls development will be treated as being fully subject to the provisions of Part I, except with respect to annual charges for the use, occupancy and enjoyment of the 108 acres, or the part thereof within the project boundary, and compensation for WWPC's rights to utilize such lands and the 10,000 cfs flow, upon takeover by the United States or relicensing to another.[36] [37]

The Commission further finds in lieu of the fifth additional finding and conclusion of the presiding judge:

The Washington Water Power Company operates and maintains the Little Falls Dam in and across the Spokane River, a navigable water of the United States within the State of Washington, together with conduits, a power house, and other works of the Little Falls project incidental to the development of electric power across, along or in the Spokane River, partly under and in accordance with the terms of a permit granted prior to June 10, 1920, and partly without having a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the Federal Power Act, in violation of Section 23(b) of the Federal Power Act.

The Commission orders:

(A) The Initial Decision issued April 1, 1980, is affirmed as modified by Ordering Paragraph (B) hereof.

(B) Within 90 days of the date of this opinion and order, The Washington Water Power Company shall file an application pursuant to the Federal Power Act and the Commission's Rules and Regulations thereunder to amend its license for Project No. 2545 to include as part of the project the Little Falls development. Nonetheless, as provided by Section 23(a) of the Federal Power Act, The Washington Water Power Company may elect in the application to continue to operate and maintain that development under and in accordance with the terms of the permit granted by the Secretary of the Interior on August 29, 1908, to the extent of its authority as determined in this opinion and order, and, in that event, the

provisions of Part I of the Federal Power Act shall not be construed as affecting that permit or the authority thereunder, as so determined.

(C) All exceptions not granted shall be deemed denied.

(D) The motion for oral argument filed by The Washington Water Power Company on April 30, 1980, and renewed on September 2, 1980, is denied.

(E) The petition to reopen the proceeding filed by The Washington Water Power Company on February 13, 1981, is granted, and the proceeding is hereby reopened for the limited purpose of receiving into evidence the eight pages appended to the petition consisting of a copy of the transmittal letter dated January 28, 1981, of the National Archives and Records Service of the General Services Administration, and a copy of the regulations of the Department of the

Interior under the Act of March 3, 1905. The eight pages shall be designated collectively as Exhibit No. 160.

—Footnotes—

[1] The Federal Water Power Act was amended in 1935 to change its name to the Federal Power Act, modify certain existing provisions substantively and designate them as Part I, and enact Parts II and III. It is customary to distinguish between the pre- and post-amendment statute by its pre- and post-amendment names in the context that the FPA, as a new statute, superseded the FWPA.

[2] The FWPA was oriented toward voluntary applications to obtain the benefits of water power licenses. As more fully discussed in Opinion No. 2 (Puget Sound Power and Light Company, Project No. 2494), issued October 28, 1977, licensing applications were made mandatory in 1935 at which time Section 23 was divided into two subsections and the first sentence of Section 23(b) was enacted.

[3] The term "Commission" refers to the Federal Power Commission in contexts prior to October 1, 1977, and to the Federal Energy Regulatory Commission in contexts on and after that date.

[4] However, Section 23(b) differs in some respects from Section 4(e), so that the scope of the Commission's licensing authority under Section 4(e) is broader than the scope of the licensing requirement of Section 23(b).

[5] *E.g.*, *The Montana Power Company v. Federal Power Commission*, 445 F.2d 739 (D.C. Cir. 1970), at 750.

[6] However, until 1930 the Commission consisted of the Secretaries whose authorities were abolished.

[7] "Congress intended that the right to make application under section 23 of the act should be limited to those who, on the date of approval of the act, were possessed of authority theretofore lawfully granted." But an assignee of a permit that is personal in nature is not possessed of such authority. Opinion of the Chief Counsel to the Executive Secretary in re Southern California Edison Company, dated February 23, 1927. Seventh Annual Report of the Federal Power Commission (1927), 142, at 146-147.

[8] "[O]n the passage of the Federal Water Power Act the authority of the Secretary of Agriculture to approve transfers or assignments of water power permits ceased and determined, and a like authority was immediately vested in the Federal Power Commission." 32 Opinions of Attorneys General 525 (1921), at 531.

[9] Some statutes, such as the Act of March 3, 1905, involved herein, gave the Secretary of the Interior authority with respect to waters associated with government lands.

[10] *Montana Power Company v. Federal Power Commission*, 185 F.2d 491 (D.C. Cir. 1950) at 496, affirming in relevant part The Montana Power Company, 7 FPC 163 (1948).

[11] Senate Report No. 621 (at 47) and House Report No. 1318 (at 25), 74th Congress, 1st Session, *infra*.

[12] "[A]ll federal grants are construed in favor of the Government lest they be enlarged to include more than what was expressly included." *United States v. Grand River Dam*

Authority, 363 U.S. 229 (1960), at 235; *The Northwest Paper Company v. Federal Power Commission*, 344 F.2d (8th Cir. 1965), at 51. "Statutes said to restrict the power of government by the creation of private rights are, like other public grants, to be strictly construed for the protection of the public interest." *Reichelderfer v. Quinn*, 287 U.S. 315 (1932); *The Northwest Paper Company v. Federal Power Commission*, *supra*, at 51. Under these principles, pre-FWPA grants of what is now partial authority should be construed to the extent practicable as not being affected by the FPA but, nonetheless, as not being sufficient under Section 23(b) to avoid licensing.

[13] Interior's practice of endorsing approvals is mentioned in The Long Struggle for Effective Water Power Legislation by Gifford Pinchot, 14 The George Washington University Law Review 9 (1945), at 11.

[14] *Montana Power Company v. Federal Power Commission*, 185 F.2d 491 (D.C. Cir. 1950).

[15] Congressman Jones explained to the House when the bill was passed,

> [T]he question of the acquirement of water rights on the reservation is a matter of some doubt. This bill simply authorizes the acquirement of water rights on the reservation side of the river under the laws of the State of Washington, and the committee has put in a further restriction that it must be with the consent of the Secretary of the Interior. *See* page 2413 of the Congressional Record appended to the Initial Brief of the Spokane Indian Tribe.

[16] A proviso said

> That no lands shall be granted under this Act until after the Secretary of the Interior is satisfied that the person, association, or company applying has made said application in good faith and with intent and ability to use said lands for the purposes above specified and that it requires the quantity of land applied for in such use. . . .

[17] Early in 1981 WWPC finally obtained a copy from the National Archives and Records Service of the General Services Administration and, on February 13, 1981, petitioned to reopen the record of this proceeding for the limited purpose of receiving the regulations into evidence. As discussed *infra*, in note 37, the copy of the regulations is being admitted into evidence.

[18] It should be noted that all hydro-electric projects do not involve the construction of dams or other obstructions in waterways. For example, Project No. 176 diverted water from a river through a tunnel in one bank of the river, as discussed in Opinion No. 36, at 10 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979.

[19] WWPC's title is derived from the grant of 100 acres to Wilson that was assigned by Wilson to WWPC, and from the grant of 8 acres to WWPC.

[20] We use the term "fee simple" as being synonymous with "fee simple absolute" and signifying an inheritable estate free from any conditions or restrictions--the largest estate and most extensive interest in land. *See* Black's Law Dictionary, Revised Fourth Edition (1968), at 742. It is to be

distinguished from a lesser estate which is variously known as a "conditional fee" or a "fee simple conditional", such as a condition of termination if the land is not used for the development of water power within a reasonable period of time (see *Big Bend*, *infra*), or a condition of termination if land used for the development of water power is no longer used for that purpose.

[21] "[R]eservations" means national forest, tribal lands embraced within Indian reservations, military reservations, and other lands and *interests in lands* owned by the United States and withdrawn, reserved, or withheld from private appropriation and disposal under the public laws; also lands and *interests in lands* acquired and held for any public purposes; but shall not include national monuments or national parks . . . [Emphasis added].

[22] *Federal Power Commission v. Louisiana Power and Light Company*, 406 U.S. 621, 647-648 (1972). Section 4(g) of the FPA authorizes the Commission, on its own motion, to investigate any occupancy of "reservations" for the purpose of developing electric power, and to issue such order as it may find appropriate and in the public interest to conserve and utilize the water power resources of the region. Certainly, that authority is broad enough to empower the Commission to determine whether particular interests in land are "reservations" within the purview of the FPA.

The case cited by WWPC (*The Niagara Falls Power Company*, Project No. 16), 1 FPC 716 (1938), was said to have been "in the nature of a suit to try title to the lands and adjacent waters utilized by Project No. 16." Although it continues to be authoritative with respect to title to water in the light of Section 27 of the FPA, it has been superseded by

Tuscarora and is no longer authoritative with respect to issues associated with title to lands.

[23] Since June 10, 1920, is the critical date for authorization other than a license under the FPA, we will not decide whether Interior was still authorized in 1924 to issue a patent covering its grant to Wilson that was assigned to WWPC, as well as its grant to WWPC. *See* the 1921 opinion of the Attorney General, *supra*. Interior and the Spokane Indian Tribe contend in their briefs opposing exceptions that the Act of March 3, 1905, did not authorize the 1924 patent.]

[24] Wilson submitted an application dated April 5, 1905 (Exhibit 5), which, as amended January 24, 1906 (Exhibit 11), and resubmitted, sought 245 acres of the Spokane Indian Reservation, but was approved as to 209 acres on May 4, 1906 (Exhibit 16). Thereafter, Wilson submitted an application dated September 22, 1906 (Exhibit 19), which sought "additional land" within the Spokane Indian Reservation included within a metes and bounds description covering 100 acres, more or less. The latter application was approved on November 3, 1906 (Exhibit 23), on the condition that Wilson relinquish "all rights heretofore acquired by virtue of Department approval on May 8, [sic., 4] 1906, of his former application."

Tribal damages were assessed and paid on the basis of 100 acres (Exhibit 23) and, therefore, the Wilson grant is said throughout this opinion to be 100 acres. Similarly, the WWPC grant, *infra*, is said to be 8 acres, although in reality both grants may differ from those nominal amounts.

[25] As mentioned earlier, Congressman Jones told Congress that the Act of March 3, 1905, did not carry the right to dam the Spokane River.

[26] Section 9 provided, in pertinent part,

> That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, that such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. . . . WWPC claims that it was not required to obtain authorization thereunder because the Spokane River was not considered navigable at that time. While its claim respecting navigability is supported by Congressman Jones' statement to the House (page 2413 of the Congressional Record), that is irrelevant, as mentioned earlier.

[27] The endorsement of the Assistant Secretary was departmental approval. Exhibit 62 states, in this connection, that WWPC's application to purchase the 8 acres was approved on August 29, 1908.

[28] While the authority of Congress to grant water rights has been challenged, the fact that Congress specified that appropriations must be under and pursuant to the laws of the

State of Washington, moots that challenge. WWPC appears to have complied with the laws of the State of Washington and to have received a grant from Interior.

[29] In other words, even though Interior's regulations under the Act of March 3, 1905, did not require Interior's approval of the transfer of the Wilson permit granted on November 3, 1906, WWPC is not able to operate and maintain the development "under" the terms of that permit, within the purview of Section 23(b), because only Wilson, as permittee, could do so. But the terms of WWPC's permit granted on August 29, 1908, are broad enough to include the interests under the Wilson permit that were assigned to WWPC on July 8, 1907.

[30] *See Pennsylvania Water & Power Co. v. Federal Power Commission*, 123 F.2d 155 (D.C. Cir. 1941), at 161-3, *cert. denied* 315 U.S. 806 (1942), which holds that Section 23(b) applies to a dam constructed prior to June 10, 1920, in waters that were not considered navigable at the time of construction.

[31] Senate Report No. 621, 74th Congress, 1st Session, describes the purpose of the first sentence of Section 23(b) at 47, as follows:

> [A] provision is inserted expressly making it unlawful to construct a project on any navigable waters without a license granted pursuant to the act. *This latter provision is in substance the effect of the River and Harbor Act of 1899 when read with the Water Power Act*. It is thought desirable to bring together in a single act the positive requirements regarding the construction of water power projects. . . . *The act*

> *would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern* [Emphasis added].

See, also, House Report No. 1318, 74th Congress, 1st Session, at 25.

While it could be argued that § 9 of the Rivers and Harbors Appropriation Act of 1899 prohibits only the construction of dams without authorization, we believe that a requirement for authority to construct a dam implicitly includes a requirement for authority to operate and maintain the dam for the period of its useful life. In *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925), the Supreme Court said, at 429, with respect to § 10 of that Act (33 U.S.C. § 403), which prohibits, among other things, the creation of unauthorized obstructions to the navigable capacity of waters of the United States,

> There is neither reason nor opportunity for a construction that would not cover the present case. . . . It is applied prospectively to the water henceforth to be withdrawn. *See, also*, the quoted portion of *Appalachian, supra*, which suggests that § 9 deals with the maintenance as well as the erection of structures in navigable waters, and *Pennsylvania Water & Power Co. v. Federal Power Commission, supra*.

See, also, the quoted portion of *Appalachian, supra*, which suggests that § 9 deals with the maintenance as well as the erection of structures in navigable waters, and *Pennsylvania Water & Power Co. v. Federal Power Commission, supra*.

[32] The FPA logically must reach dams that were not reached by Sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899 because the term "navigable waters" is defined broadly in the FPA and reaches waters that may not be navigable in fact, such as "parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

[33] In this respect, the regulations under the Act of March 3, 1905, were different from the regulations under the Act of February 15, 1901, that were involved in *The Montana Power Company v. Federal Power Commission*, *supra*, and required formal approval of transfers.

[34] Furthermore, after the boundaries of the Wilson grant were resurveyed in 1909, Interior approved WWPC's application to correct the errors made in the original survey. Such action was consistent with Interior's having approved WWPC's utilization of the 100 acres for a water power development, and is consistent with our conclusion that the terms of WWPC's permit granted August 29, 1908, include the utilization of all 108 acres.

[35] Of course, if the WWPC permit is challenged successfully, the Spokane Indian Tribe would be entitled to annual charges from the date of the license amendment. It would be appropriate to condition the license amendment to provide for such a contingency if timely litigation is initiated for that purpose.

[36] On September 2, 1980, WWPC filed a document seeking to renew its motion for oral argument filed April 30, 1980,

on the grounds that (1) the briefs opposing exceptions contain inaccurate statements and allegations, as well as statements which belong in briefs on exceptions, and (2) the Commission's rules do not give WWPC an opportunity to reply or respond. Improper material in briefs opposing exceptions may be challenged through a motion to strike filed pursuant to § 1.12 of the Commission's Rules of Practice and Procedure, or corrected through a motion for leave to file a reply or response to the brief opposing exceptions, accompanying a tendered reply or response. Since WWPC does not in its motion point out specific inaccuracies or improper material, we are unable to treat it other than as cumulative of its earlier motion for oral argument.

[37] On February 13, 1981, WWPC filed a petition pursuant to § 1.33(c) of the Commission's Rules of Practice and Procedure to reopen this proceeding for the limited purpose of receiving into evidence eight pages consisting of a copy of Interior's regulations under the Act of March 3, 1905 (seven pages, including one page from the back of one of the pages of the regulations specifying The National Archives' file location of the original), and a copy of a transmittal letter pertaining to the regulations dated January 28, 1981, from the National Archives and Records Service of the General Services Administration, to WWPC's counsel (one page). The Commission staff counsel, Interior and the Spokane Indian Tribe indicated in response that they did not object to reopening the proceeding for the limited purpose of admitting the regulations into evidence. The arguments contained in the filings were considered solely for that purpose.

We find that the regulations are relevant and material to the issues herein and were not available to the parties earlier, and, therefore, that the proceeding should be

reopened for the limited purpose of admitting them into evidence. Such hearsay evidence has probative value and is admissible in administrative proceedings under the FPA. *See* the discussion of Section 308(b) in *The Montana Power Company v. Federal Power Commission*, *supra*, 185 F.2d, at 497. Furthermore, the regulations are admissible under an exception to the hearsay rule as an historic public document. Although they lack the testimony or official seal of their custodian to establish that they are what they purport to be, none of the parties has objected to their authenticity and, therefore, any objections thereto and to the granting of the petition are deemed waived as provided by § 1.33(a)(2) of the Commission's Rules of Practice and Procedure.

92-546

NO. _____

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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

The Washington Water Power Company,

Petitioner,

v.

Spokane Indian Tribe,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Docket No. 91-35000
VOLUME III

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TABLE OF CONTENTS
Volume III

Page

The Washington Water Power Company, Project No. 2545-007, FERC Opinion No. 117-A, 25 FERC ¶ 61,002 (pp. 61,001-et seq.) (1983) . . . 480a

Washington Water Power v. F.E.R.C., 775 F.2d 305 (D.C. Cir. 1985) . . 594a

25 FERC ¶ 61,002

The Washington Water Power Company, Project No. 2545-007

Opinion No. 117-A; Opinion and Order Denying Rehearing, Deferring Filing Obligation and Denying Oral Argument

(Issued October 4, 1983)

Before Commissioners: C. M. Butler III, Chairman; Georgiana Sheldon, A. G. Sousa and Oliver G. Richard III.

[Note: Opinion No. 117; Opinion and Order Affirming, with Modifications, the Initial Decision on Jurisdiction, issued April 8, 1981, appears at 15 FERC ¶ 61,039.]

On May 8, 1981, The Washington Water Power Company (WWPC) filed an application pursuant to Section 313(a) of the Federal Power Act (FPA) and § 1.34 (now Rule 713) of the Commission's Rules of Practice and Procedure for rehearing of Opinion No. 117 issued April 8, 1981, in which (1) it was found that WWPC has a valid permit granted prior to June 10, 1920, to *occupy* lands of the Spokane Indian Reservation and *utilize*

waters of the Spokane River for its Little Falls hydro-electric development, and (2) WWPC was ordered to apply for a license under the FPA for the continued operation and maintenance of the works of that development for want of similar authority to *occupy* the waters and thereby operate and maintain its dam in the river. WWPC included a motion for a stay in its application and, concurrently, filed a separate motion for oral argument. Upon consideration of the filings, we are denying rehearing and the motion for oral argument, and deferring the filing obligation. In addition, and partly on our own initiative, we are also modifying certain parts of the Opinion.

Navigability

Section 1.31(c)

The navigability of the Spokane River was an issue in this proceeding through the Initial Decision, in which the

presiding administrative law judge concluded,

> The evidence, taken in its entirety, is sufficient to establish navigability under § 3(8) of the Federal Power Act . . . It is therefore found that Little Falls Dam is situated on a "navigable water of the United States."

WWPC said in its brief on exceptions that its Issue No. 5 was,

> Is the Spokane River a navigable water of the United States under the Federal Power Act and for all other purposes?

And WWPC argued, in pertinent part, as follows:

> . . . If WWPCo were contemplating building a new project at the Little Falls site, there is little doubt that the Company would be required to obtain a license for such project under the Federal Power Act and that the Spokane River would be considered to be a navigable water of the United States as defined by Section 3(8) of the Federal Power Act. WWPCo does not take exception to a finding that the Spokane River constitutes navigable water as

> defined in Section 3(8) of the Federal Power Act.
>
> WWPCo does take exception to any conclusion or finding that the Spokane River, at the Little Falls site, is considered to be a navigable water of the United States for any other purpose . . .

Opinion No. 117 does not address the interaction of the evidence and the cases on navigability. Instead, it invokes Section 1.31(c) of the Commission's Rules of Practice and Procedure which states, in pertinent part,

> . . . Objections to any part of an intermediate decision which is not the subject of exceptions may not thereafter be raised before the Commission . . .in an application for Commission rehearing, and shall be deemed to have been waived.[1]

In so invoking Section 1.31(c), Opinion No. 117 says that the concern in this proceeding with respect to the navigability of the Spokane River pertains only to navigability within the purview of

the definition contained in the Federal Water Power Act (FWPA) and the FPA.

WWPC contends in its Error No. 1 in its application for rehearing that it "has not waived or admitted any *fact* concerning the issue of navigability", and that it conceded in its brief on exceptions that if it were constructing a new project "the Spokane River would probably be considered to be a navigable water of the United States as defined by Section 3(8) of the FPA."

Opinion No. 117 does not say that WWPC waived or admitted any fact pertaining to the issue of navigability. It says, instead, that the legal operative effect under Section 1.31(c) of WWPC's failure to except to the issue of navigability, was waiver of *further objections* to that issue. We have again considered WWPC's argument in its brief on exceptions in the light of its application

for rehearing, and we find that the invocation of Section 1.31(c) was fair and consistent with our practice. If WWPC had in fact excepted to the judge's determination that the Spokane River is navigable at Little Falls within the purview of Section 3(8), it would have attempted to explain why his rationale and conclusion were wrong in the light of the evidence and the relevant cases. WWPC did not do that, but argued, instead, that the judge's determination that the river is navigable pertained only to Section 3(8). By implication, WWPC argued that his determination did not pertain to the Rivers and Harbors Appropriation Act of 1899.

Navigability Under the Federal Power Act

Although Opinion No. 117 does not err insofar as it invokes Section 1.31(c), this Opinion No. 117-A will address the navigability of the Spokane River (1) to

show that the judge's conclusion is supported by the record and, therefore, that the invocation of that provision was not arbitrary, and (2) to explain why WWPC should have obtained the approval of Congress *and* the Secretary of War before constructing the Little Falls dam, or, at a minimum, the approval of the Secretary of War. As discussed below, we have concluded that the Spokane River is navigable at Little Falls under common law principles as well as within the purview of the FPA.

The Spokane River is the outlet of Coeur d'Alene Lake, in Idaho, and, until 1942, flowed 111 miles in a westerly direction into the Columbia River, in Washington, upstream from the "Big Bend" where the Columbia turns from a southerly to a westerly direction. In 1942 the Grand Coulee dam was completed below the confluence of the Spokane and Columbia

rivers, and the waters of the Columbia River were impounded to form the 151-mile-long Franklin D. Roosevelt Lake, which is a navigable waterway. At the same time, the Corps of Engineers began to consider the Spokane River as being navigable from its mouth to the Little Falls development (Exhibit No. 103) since one branch of that lake extends almost 30 miles up the Spokane River to the tail race of that development. Indeed, WWPC later received a favorable settlement in a law suit (Exhibit No. 131) that it initiated on the ground that the backwaters of the Grand Coulee dam flooded the tail race of the Little Falls development and thereby impaired its electrical output under certain conditions. In other words, the Spokane River now exists below Little Falls as a branch of the navigable Franklin D. Roosevelt Lake.

Today, WWPC is required by the first sentence of Section 23(b) of the FPA to have a permit or license to operate and maintain the works of its Little Falls development for the following reasons, each of which itself subjects the works of that development to our licensing jurisdiction: (1) The tail race of that development is occupying part of a waterway that is navigable in fact and, therefore, is a "navigable water" within the definition contained in Section 3(8) of the FPA. (2) The tail race of that development is occupying part of a stream that has "been authorized by Congress for improvement by the United States" as part of the Grand Coulee development and, therefore, it is occupying part of a waterway that is navigable in law within the purview of the same definition.[2] (3) The approximate five-mile reach of the Little Falls development is occupying part

of a stream that consists of interrupting falls, shallows, or rapids, situated between the navigable-in-fact backwaters of the Grand Coulee dam, and WWPC's own navigable-in-fact Long Lake impoundment less than five miles upstream from the Little Falls dam and, therefore, it is occupying part of a waterway that is navigable in law within the purview of the same definition. Long Lake is about 20 miles long (Exhibit 105), has a depth of 24 feet (Exhibit No. 107), and is one of the impoundments that is licensed as part of WWPC's Project No. 2545.[3] Therefore, the record supports the judge's conclusion that the Spokane River at Little Falls, today, is a navigable water of the United States within the purview of Section 3(8) of the FPA.

The first sentence of Section 23(b) of the FPA prohibits, in the absence of a permit or a license, the present operation

and maintenance of facilities constructed in the past, as well as the present construction of facilities, in and along navigable waters of the United States. Therefore, since WWPC concedes that the Spokane River is navigable within the meaning of Section 3(8) with respect to facilities that would be constructed presently, it would seem to concede in law that the river is navigable within the meaning of that section with respect to facilities that were constructed in the past and presently must be operated and maintained.

In addition, WWPC's concession in its application for rehearing that its Little Falls development is operated in hydraulic coordination with all of its licensed hydro-electric developments on the Spokane River (*see, also*, Opinion No. 117, at 1), is sufficient to require licensing of the works of that development as part of a

single "project" as defined in Section 3(11) of the FPA, even if the river is *not* navigable at Little Falls, if it is navigable in any reach occupied by Project No. 2545, or if any works of that project are otherwise required to be licensed.[4] We are satisfied, in this connection, that the evidence discussed in the Initial Decision, beginning at 24, establishes the historic use of the Spokane River as a highway for sawlog commerce from its source in Idaho, at least as far downstream as Spokane, Washington, and hence its historic navigability in fact in that reach which is occupied by several developments of WWPC's Project No. 2545.[5]

Navigability Under Common Law Principles

Furthermore, the Spokane River is navigable at Little Falls under common law principles even though the record contains evidence to establish that the Corps of Engineers and others did not consider the

Spokane River to be navigable prior to 1942, at least in some reaches along the southern boundary of the Spokane Indian Reservation.

The generally accepted definition is contained in *The Daniel Ball*, 77 U.S. 557 (1871), at 563 (emphasis added):

> . . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or *are susceptible of being used, in their ordinary condition*, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form *in their ordinary condition* by themselves, or by uniting with other waters, a continuous highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Supreme Court added in *The Montello*, 87 U.S. 430 (1874), at 441:

> The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway . . .
>
> * * * *
>
> The learned judge of the court below rested his decision against the navigability of the Fox River . . . chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation . . . [T]he rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country which were so interrupted by rapids as to require artificial means to enable them to be navigated without break . . . [T]he vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although

> its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars.

And the Supreme Court amplified and refined those decisions in *United States v. Appalachian* Electric Power Co., 311 U.S. 377 (1940), and said at 407-9 (footnotes omitted):

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. "Natural and ordinary condition" refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken . . . The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvement would be useful. When once found

> to be navigable, a waterway remains so . . .
>
> . . . It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce. In determining the navigable character of the New River it is proper to consider the feasibility of interstate use after reasonable improvements which might be made.

We can understand that those who considered the lower part of the Spokane River to have been not navigable prior to 1942 may not have envisioned the feasibility of a multiple purpose development of the magnitude of Grand Coulee, which is the largest concrete structure in the world in terms of cubic content.[6] The fact remains, however, that Grand Coulee is in place. And, therefore, in conformity with *Appalachian*, in determining the navigable character of the Spokane River at Little Falls, it is

proper to consider the feasibility of interstate use after the improvements which have been made. They were authorized by Congress and must, therefore, be deemed in law to have been reasonable.

On the basis of 40-year data from July 1928 through June 1968 (Exhibit No. 136), the average median monthly flow at Little Falls is 7,159 cubic feet per second (cfs), ranging from a median low of 1,865 cfs in September to a median high of 19,700 cfs in May. And on the basis of 5-year data from 1973-74 through 1977-78 (Exhibit No. 137), the surface elevation of Franklin D. Roosevelt Lake is maintained *at or above* the elevation of the tail race of the Little Falls development about half of the time (Exhibit No. 105).[7] Therefore, there is normally little or no surface gradient from the Little Falls development to the

Spokane River branch of Franklin D. Roosevelt Lake.

We conclude that the volume and regularity of the flow of the Spokane River at Little Falls, and the gradient, are such that the Spokane River branch of Franklin D. Roosevelt Lake is susceptible of being used in its improved condition as a highway for commerce from the mouth of the Spokane River at least to the Little Falls development. And we find that the Spokane River is navigable at Little Falls under the common law definition contained in *The Daniel Ball*, as amplified and refined in *Appalachian*.

The Occupation of the River Requires the Consent of Congress

When the Little Falls development was being constructed, the Spokane River was "susceptible of being used" in its present improved condition as a highway for commerce from its mouth to Little Falls,

and, therefore, was navigable "within the meaning of the acts of Congress" (both quotes, from *The Daniel Ball*), including the Rivers and Harbors Appropriation Act of 1899. We emphasize, however, that the Grand Coulee development merely *proved* that the river is susceptible of such use by backing up the lower reaches to form a lake, which became one of a series of lakes, moving upstream. Essentially the same situation would have come about even if the Grand Coulee development had not been built.

As shown by Exhibit No. 159, a Lieutenant Symons, of the Corps of Engineers, entered the mouth of the Spokane River in 1881 and proceeded to Camp Spokane about 1-1/2 miles upstream, which establishes that the river was then navigable to that point. Camp Spokane became Fort Spokane, and the site was later permitted to the Big Bend Transit

Company under the Act of March 3, 1905, for a hydro-electric development that would have included a dam with a crest at an elevation of 1,179 feet m.s.l.,[8] 110 feet below the Grand Coulee dam. Although a smaller lake with a lower surface elevation would have been formed in the lower reaches of the Spokane River, it would nonetheless have become one of a series of lakes establishing the navigability of that part of the river.

In 1892, 11 years later, Captain Symons made a preliminary examination of the other end of the Spokane River between Coeur d'Alene Lake and Post Falls, Idaho, and described the river in his report:

From the lake to Post Falls there are no rapids or bed rock to interfere with navigation, the river flows over a bed of gravel and boulders, and has a general depth at low water of about 3 feet. Just at the head of the river, at the lake,

there is a bar upon which the navigable depth is reduced to probably 2 feet at low water, and part way down is another bar upon which is an equal depth.[9]

Section 9 of the Rivers and Harbors Appropriation Act of 1899[10] made it unlawful to construct or commence the construction of any bridge or dam, among other structures, over or in any navigable river of the United States, until the consent of Congress was obtained, and the plans were approved by the Chief of Engineers and the Secretary of War. A proviso said that when the navigable portions of a river were wholly within a single State, the consent of a State legislature would be required, but the plans would nonetheless have to be approved by the Chief of Engineers and the Secretary of War.

Section 9 is best understood in the light of Sections 4 and 7 of the Rivers

and Harbors Appropriation Act of 1890, 26 Stat. 426, which prohibited the construction of bridges and dams, among other structures, that obstructed navigation in navigable waters, unless approved by the Secretary of War:

> In 1899 the terms of this prohibition were enlarged, and every [bridge and] dam on or across a navigable stream, whether actually navigable at the point in question or not, and independently of the fact whether such structure interfered with actual navigation, was prohibited "until the consent of Congress to the building of such structure shall have been obtained, and until" the plans for the same are approved by the Chief of Engineers and the Secretary of War."

Section 13 of the Rivers and Harbors Appropriation Act of 1899 prohibited the discharge of refuse into navigable waters of the United States, "or into any tributary of any navigable water from which the same shall float or be washed

into such navigable water . . . " In 1900, a United States marshal filed a complaint against the Spokane & Idaho Lumber Company for violating Section 13 by allowing sawdust and other refuse to enter the Spokane River, which was said to be a navigable stream (Exhibit No. 133). And in 1905 the Secretary of War approved a bridge over the Spokane River near Coeur d'Alene, Idaho.[12] Accordingly, the Spokane River was treated by Federal authorities as being navigable for the purpose of administering the Rivers and Harbors Appropriation Act of 1899, even before the Little Falls development was constructed.

Since the Spokane River was used as a highway for saw-log commerce from Coeur d'Alene Lake, Idaho, to Spokane, Washington, as discussed by the judge, it was clearly navigable in more than one State and, therefore, WWPC was required by Section 9 of the 1899 statute to obtain

the consent of Congress for the construction of the Little Falls dam, whether or not the river was navigable at Little Falls.[13] WWPC's failure to do so left it vulnerable to obtaining such consent either in the form of a permit issued under the Act of March 3, 1905, if that Act empowered the Secretary of the Interior to authorize the construction of dams across the river, or a license amendment to be issued under the FPA.

The Act of March 3, 1905, was a modification and enlargement of the Act of February 15, 1901 (31 Stat. 790), insofar as concerned the Spokane Indian Reservation.[14] The earlier Act empowered the Secretary of the Interior to permit the use of rights-of-way through public lands and reservations of the United States

> . . . for electrical plants, poles, and lines for the generation and distribution of

> electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits, and for water plants, *dams*, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder . . . *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park. [Emphasis of "dams" added.]

Section 1 of the Act of March 3, 1905, authorized the acquirement of the right to use the waters of the Spokane River along the southern boundary of the Spokane Indian Reservation by

appropriation under and pursuant to the laws of the State of Washington. Section 2 empowered the Secretary of the Interior to grant such appropriators land on the reservation

> . . . such as shall be necessary and requisite for overflow rights and for the erection of suitable water, electrical, or power plants, *dams*, wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water . . . [emphasis added].

In the course of the debate, Congressman Jones, who sponsored the bill, was asked whether the Secretary of the Interior would be empowered to authorize dams across the Spokane River, and he replied,

> Oh, no; not at all. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.

In the absence of the legislative history, the Secretary of the Interior might appear to have been empowered by Section 2 to grant lands" . . . for the erection of suitable . . . dams . . . for the development of power . . . " and, by implication, to authorize the construction of dams across the Spokane River. But the legislative history casts a different light on that authority. The word "dams" apparently was included in Section 2 because it was included in the Act of February 15, 1901,[15] and because the works of hydroelectric developments ordinarily include dams. But, as noted in Opinion No. 117, some hydro-electric developments have dams that are completely off the waterways that provide their energy.

Congressman Jones said that the Act of March 3, 1905, was reported from the Committee on Indian Affairs, and that it simply affected Indian lands. His

statement that matters pertaining to damming the Spokane River would have to go to the Committee on Interstate and Foreign Commerce, should be read in the light of Section 9 of the 1899 statute, and the fact that an act of Congress was then required for every dam on a stream that was navigable in two or more States, whether or not it was navigable at the site of the prospective dam. Since Congressman Jones knew that the War Department had investigated the navigability of the Spokane River, presumably meaning the Symons excursions, he apparently knew that the Department was treating the upper reaches of the river as being navigable for the purpose of administering the 1899 statute. And we understand his statement as meaning that prospective builders of dams under the Act of March 3, 1905, would have to take their chances on obtaining Congressional

approval under the 1899 statute to occupy the waters of the Spokane River.

In this respect, we do not agree with the *Big Bend* decision wherein the United States was required to pay condemnation damages for lands that had been permitted under the Act of March 3, 1905, on the basis of their value as a power site, rather than their lower value for agricultural purposes. The District Court (1) assumed that the Spokane River was navigable at the Fort Spokane site, which was a short distance above its confluence with the Columbia River (42 F.Supp., at 463), (2) conceded that the intent of Congress would prevail in interpreting the Act of March 3, 1905 (at 466), (3) considered the legislative history of that Act (at 467), and (4) proceeded through its opinion without challenge to its premise that the Secretary of the Interior was empowered to authorize the

construction of dams in the river. The court said, in this connection, at 464, that the defendant filed an application "to secure from the Secretary of the Interior" the right, among others, to erect a 60-foot dam, and that the latter demanded a higher dam to make full use of the power potential.[16] Although the Court issued its decision in 1941, six years after the FWPA became the FPA, it addressed the first paragraph of Section 23 of the FWPA, rather than Section 23(a) of the FPA.[17] And the Court said, at 471, that since the defendant had "a valid and existing right of way and a claim of authority theretofore given pursuant to law, it follows necessarily that that right of way grant or authority was not affected by any of the provisions of the Power Act."[18] Accordingly, the Court allowed power site values on an unchallenged premise, with which we do not

agree, that the permit included authority to dam the river.

In summary, the Spokane River was used in Idaho and Washington for floating sawlogs and, consequently, (1) it was navigable in fact in both States under the principles of *The Daniel Ball*, and (2) WWPC was required by Section 9 of the Rivers and Harbors Appropriation Act of 1899 to obtain the consent of Congress for building the Little Falls dam, whether or not the river was navigable at Little Falls. Congress did not grant such consent in a special act, or delegate to the Secretary of the Interior authority to grant such consent under the Act of March 3, 1905; and, as a result, WWPC is now required by Section 23(b) of the FPA to obtain from the Commission the consent of Congress to continue to operate and maintain that dam. Under such circumstances, WWPC is not being denied

any constitutional or other rights since it should have obtained the consent of Congress before building the dam, in which case Section 23(a) of the FPA would have allowed WWPC to continue to utilize that authority.

Whether or not the Spokane River was navigable in fact or considered navigable in fact at Little Falls when the Little Falls development was constructed, or was proved to be navigable in fact at that site when the Grand Coulee development was constructed, the river unquestionably is navigable in fact and in law at Little Falls today and, therefore, WWPC must have the consent of Congress to continue to operate and maintain the Little Falls dam. WWPC did not obtain the consent of Congress under the Rivers and Harbors Appropriation Act of 1899 (whether or not it was required to do so) or under the Act of March 3, 1905, to occupy the river at

that site and, therefore, WWPC must now obtain the consent of Congress to do so pursuant to the Federal Power Act. As the Supreme Court said in *Appalachian*, *supra*, 311 U.S., at 424, the power of Congress to regulate commerce is so unfettered that it may make the maintenance of a structure in a navigable water dependent upon a license, and Congress has done so through Section 9 of the Rivers and Harbors Appropriation Act of 1899 and Section 4(e) of the FPA.

WWPC's Permits

Opinion No. 117 finds, at 23 and 24-25, that WWPC is able to operate and maintain the Little Falls development under and in accordance with the terms of the permit granted by the Secretary of the Interior to WWPC on August 29, 1908, insofar as involves the 100 acres that were granted to David Wilson (Wilson) on November 3, 1906, and assigned to WWPC on

July 8, 1907. And it concludes, at 26, that the payment of annual charges for the use, occupancy and enjoyment of project lands that WWPC has an existing right to use, occupy and enjoy for the development of water power under the terms of its pre-FWPA permit, is a burden of project lands that is not properly imposed on WWPC as being inconsistent with the terms of that permit.

The exemption from annual charges was premised on the requirement in Section 3 of the Act of March 3, 1905, that a permittee make a one-time payment for the right to utilize reservation lands indefinitely for the development of water power, as long as the lands are so used, and on the requirement in Section 23(a) of the FPA that the other provisions of the FPA shall not be construed as affecting the authority to so utilize the lands thereunder. Having paid once for the right

of present utilization, a pre-FWPA permittee should not be required to pay a second time in the form of annual rents.

Upon further consideration, the rationale breaks down as to the 100 acres because Section 3 of the Act of March 3, 1905, contemplates payment "by said applicants" for permits, and because Wilson rather than WWPC was the applicant for the 100 acres. WWPC paid Wilson, and Wilson paid the Secretary of the Interior for the benefit of the Spokane Indians. Hence, the rationale that WWPC should not be required to pay twice for the right of present utilization should be premised on a transfer of Wilson's 1906 permit to WWPC, rather than an interpretation of the scope of WWPC's 1908 permit as including the 100 acres.

The Act of March 3, 1905, and the Secretary of the Interior's regulations thereunder, were silent as to transfers.

Permits granted under that Act were personal to the permittees (Opinion No. 117, at 24), and no application to transfer the 1906 Wilson permit to WWPC was filed with the Secretary of the Interior. Nonetheless, WWPC informed the Secretary of the Interior of the transfer and did everything necessary to obtain a permit for itself. And, as discussed in Opinion No. 117, at 24,

> there can be no doubt that on August 29, 1908, Interior approved WWPC's utilization of the entire 108 acre tract for a water power development.

A better rationale is to treat the Secretary of the Interior's action of August 29, 1908, as an after-the-fact authorization of the transfer of the 1906 Wilson permit to WWPC,[19] as well as a grant of a permit to WWPC, on the equitable principle that the Commission should regard as being done that which ought to have been done. *See The Montana*

Power Company v. Federal Power Commission, 330 F.2d 781 (9th Cir. 1964), at 788.

On August 29, 1908, the Secretary of the Interior knew that the Little Falls development was under construction and that the entire 108 acre tract was being utilized. Therefore, it was incumbent upon him to take whatever action was necessary to stop further construction, or to provide any necessary authorization within his power. We think that the Secretary of the Interior, in fairness to WWPC, should have suggested the filing of an application for approval of the transfer of the 1906 Wilson permit, which he should have considered with WWPC's application for a permit, and thus avoided the technical problem that has arisen.[20]

We now find and conclude, in lieu of the finding in Opinion No. 117, at 23 and 24-25, and n. 29 at 21, that WWPC is able to operate and maintain its Little Falls

development under and in accordance with the terms of the permit that was granted to Wilson on November 3, 1906, and transferred to WWPC on July 8, 1907, as authorized by the Secretary of the Interior on August 29, 1908, insofar as involves the 100 acres. For convenience, that permit and the one that was granted directly to WWPC on August 29, 1908, will be referred to as WWPC's 1906 and 1908 permits, respectively.

In this connection, Opinion No. 117 is modified in the following respect:

The Opinion finds in the first paragraph, and states elsewhere, that WWPC has authority under its 1908 permit to utilize waters "on the reservation side of the river" for the development of water power. That notion was derived from Congressman Jones' statement that, "This bill simply authorizes the acquirement of water rights on the reservation side of

the river under the laws of the State of Washington . . . " However, Exhibit No. 1 establishes that the southern boundary of the Spokane Indian Reservation is the southern bank of the Spokane River and, therefore, "the reservation side of the river" was the entire width of the river. We now find, in lieu of the finding in Opinion No. 117, at 1, that WWPC has authority under two permits granted prior to June 10, 1920, to occupy lands of the Spokane Indian Reservation and utilize waters of the Spokane River to continue to operate and maintain its Little Falls hydro- electric development. But we continue to find, as stated, that WWPC's authority thereunder is insufficient to continue to do so without having a license issued under the FPA.

Sections 23(a) and 23(b)

New Construction v. Existing Works

WWPC contends in its Error No. 2 that the first sentence of Section 23(b) of the FPA prohibits only the construction of project works without a permit or license, notwithstanding the express language, "It shall be unlawful . . . to construct, operate, or maintain . . . " Therefore, the Commission does not have authority under Section 23(b), according to WWPC, to require licensing of the Little Falls development.

As more fully discussed in Opinion No. 2 issued October 28, 1977 (*Puget Sound Power and Light Company*, Project No. 2494) [1 FERC ¶ 61,059],[21] Section 23 of the FWPA consisted of two paragraphs. In 1935 the first paragraph was reenacted without substantive change as Section 23(a) of the FPA, the pertinent part of which is reproduced in Opinion No. 117, at 4. At

the same time, the second paragraph was reenacted with two substantive changes as Section 23(b). One substantive change consisted of a new first sentence[22] which is reproduced in Opinion No. 117, at 2. The other consisted of changing the words "may in their discretion" in the former second paragraph of Section 23 to "shall before construction," thus changing the tenor of the provision from discretionary to mandatory. Persons intending to construct dams or other project works in *non-navigable* waters within the jurisdiction of Congress were thus *required* to file declarations of intent with the Commission to enable the Commission to determine whether such works would be jurisdictional by reason of affecting commerce.

Since the portion of Section 23(b) of the FPA that is the former second paragraph of Section 23 of the FWPA

addresses only proposals to construct project works, and since the explanation of the first sentence of Section 23(b) of the FPA uses only the word "construct" and a derivative (to the exclusion of "operate" and "maintain"), WWPC contends that the first sentence of Section 23(b) addresses only new construction, to the exclusion of existing project works. WWPC bases its contention on the explanation of Section 210 of the Public Utility Act of 1935, which amended Section 23 of the FWPA, that is contained in Senate Report No. 621, 74th Congress, 1st Session, at 47, and is reproduced in part in Opinion No. 117, at 22, n. 31.[23] The complete explanation is reproduced below with (1) the emphasis added by WWPC and (2) the last sentence omitted by WWPC:

This section also amends the second paragraph of Section 23, dealing with the

filing of declarations of intention, and makes this paragraph subsection (b) of the section. Under the present provision anyone intending to undertake a project on a nonnavigable tributary of a navigable stream may in his discretion file such a declaration with the Commission. If the Commission finds that the interests of interstate commerce would be affected by the project, it is made unlawful to proceed without having secured a license. This provision is changed to make the filing of a declaration of intention mandatory in such cases. Furthermore, a provision is inserted expressly making it unlawful to *construct* a project on any navigable waters without a license granted pursuant to the act. *This latter provision is in substance the effect of the River and Harbor Act of 1899 when read with the Water Power Act.* [24]

> It is thought desirable to bring together in a single act the positive requirements regarding the *construction* of water-power projects. Under this subsection with the two amendments here made every person *intending to construct a project* which might conceivably affect any navigable waters would be under the duty of coming to the Commission. The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern. [Emphasis added by WWPC.]

WWPC does not explain why the words "operate" and "maintain" should be read out of the first sentence of Section 23(b). Nor does WWPC explain the last sentence that it omitted, which appears to require the Commission to assert jurisdiction over project works in and along navigable waters and on public lands and reservations, to the full extent of the authority delegated to the Commission.

WWPC emphasizes the sentence that explains that the first sentence of Section 23(b) "is in substance the effect of the River and Harbor Act of 1899 when read with the Water Power Act." Section 9 of the Rivers and Harbors Appropriation Act of 1899, which is codified as 33 U.S.C. § 401 and is reproduced in Opinion No. 117, at 19, n. 26, prohibits the construction and the commencement of construction of bridges, dams and other facilities in navigable waters without the consent of Congress, but does not expressly prohibit the operation or maintenance of such facilities. Similarly, Section 10, which is codified as 33 U.S.C. § 403, prohibits, among other things, the creation of unauthorized obstructions to the navigable capacity of waters of the United States, without also expressly prohibiting the operation or maintenance of such obstructions. In 1925, ten years

before Congress amended Section 23 of the FWPA, the Supreme Court held that Section 10's prohibition against the creation of unauthorized obstructions, also applied to the maintenance of such obstructions.[25] Congress amended Section 23 in 1935 and, consistent with the foregoing Supreme Court interpretation, included the words "operate" and "maintain" in the first sentence of Section 23(b). And five years later, in 1940, the Supreme Court suggested that Section 9's prohibition against the construction of dams and other facilities without the consent of Congress, also included the maintenance of such facilities. The Supreme Court said, in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), at 424:

> Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or *maintenance* of a structure in a navigable

> water dependent upon a license. *This power is exercised through § 9 of the Rivers and Harbors Act of 1899 prohibiting construction* without Congressional consent and through § 4(e) of the present Power Act.

The House Report, *supra*, in common with the Senate Report, *supra*, spoke only of the construction of facilities or projects, as WWPC says. But the House Report, unlike the Senate Report, also addressed the matter of permits granted prior to June 10, 1920. Since Congress was embodying the prohibitions of the 1899 statute in the water power statute, it is highly unlikely that in 1935 the House Report was addressing the construction-only of dams that had been authorized by permits granted at least 15 years earlier. Virtually all of the dams impliedly or expressly authorized by pre-FWPA permits would then have been built. We think that the House and Senate

reports were addressing the ongoing operation and maintenance of those and other dams, as well as the prospective construction of all non-government water power dams in navigable waterways under existing and future licenses, including any unconstructed dams under outstanding pre-FWPA permits. And we think that the reports were saying that the *1899 statute*, in common with the 1935 statute, prohibits ongoing operation and maintenance activities as well as initial construction activities.

We therefore reject WWPC's contention that the first sentence of Section 23(b) addresses only new construction, to the exclusion of existing project works.

Scope of Section 23(a)

Section 23 of the Administration Bill, which was introduced in the 65th Congress, 2nd Session, as H.R. 8716, began as follows:

> Sec. 23. That the provisions of this Act shall not be construed as revoking any permit or valid existing right of way heretofore granted, or as revoking any authority heretofore given pursuant to law . . .

The provision was not changed, and the bill as agreed to in conference was introduced in the 66th Congress, 1st Session, as H.R. 3184. In the Senate, the Committee on Commerce changed the word "revoking" to "affecting" in two places, to make the provision read,

> Sec. 23. That the provisions of this act shall not be construed as ~~revoking~~ *affecting* any permit or valid existing right of way heretofore granted, or as ~~revoking~~ *affecting* any authority heretofore given pursuant to law . . .

WWPC claims in its Error No. 4 that these changes were "an apparent attempt on the part of the Committee on Commerce to broaden the exemption" from licensing and, consequently, the Commission erred in its application of Section 23(a).

Upon reconsideration, we have concluded that Congress intended that the FWPA would neither diminish nor enlarge rights under pre-FWPA permits, and that Opinion No. 117 errs in applying the present Section 23(a) too broadly, rather than too narrowly as claimed by WWPC. Although Section 23(a) protects property rights incident to the ongoing authority of pre-FWPA permits to operate and maintain hydro-electric developments, it does not address property rights incident to the transfer of hydro-electric developments in connection with relicensings and takeovers, other than as expressly set forth in the proviso.

Senate Report No. 180, 66th Congress, 1st Session, dated September 12, 1919, discussed several of the changes made by the Committee on Commerce, and said with respect to the others, including the foregoing changes, "Most of the amendments

recommended are of a minor character and largely make more clear and certain the meaning of the House provisions."

As more fully discussed in Opinion No. 88 (*City of Bountiful, Utah, et al.*, Docket No. EL78-43) [11 FERC ¶ 61,337], at mimeo p. 28, H.R. 3184 was accompanied in the Senate by S. 152, a bill that had been introduced by Senator Jones, Chairman of the Committee on Commerce (who as a Congressman sponsored the Act of March 3, 1905). On June 25, 1919, Gifford Pinchot (Pinchot), who was then President of the National Conservation Association, wrote to Senator Jones suggesting a number of changes for Senator Jones' S. 152. Among them, Pinchot suggested changing "revoking" to "affecting" in two places as part of a larger revision to make sure that revocable permits would not be enlarged by the courts into perpetual grants:

> The first paragraph of Sec. 22, of your bill, seems intended to save existing rights under permits now outstanding, if the permittees do not elect to take out a license under the new law. It is clear that if such rights are not to be diminished by the new law neither should they be enlarged; but the provision that the holders "may retain the same, subject to the conditions set forth in the grant thereof and" to the regulations now in force gives ground for contention, and perhaps for a ruling by the courts, that would change the outstanding permits (many of which are by existing law expressly made revocable at the discretion of the issuing authority) into grants of perpetuity. We therefore deem it vital that said first paragraph be amended as follows: Strike out the word "revoking" in both places where it occurs in lines 21, and 32, on page 30, of your bill, and substitute therefor in each place the word "affecting" . . .

Although the first paragraph of Section 23 of H.R. 3184 did not contain most of the language that Pinchot found objectionable in Senator Jones' S. 152, it

did contain the language that included the word "revoking" in two places. As indicated, Senator Jones' Committee on Commerce changed the word "revoking" to "affecting" in both places in H.R. 3184, and the Senate passed H.R. 3184 as so changed on January 17, 1920.

Thereafter, the Committee of Conference retained the changes of the Committee on Commerce, which were described in the Statement of the Managers on the Part of the House,[26] as "verbal changes." In other words, the word "affecting" in Section 23(a) of the FPA means "revoking"; and the change in terminology was verbal only, and not an enlargement or broadening of the first paragraph of Section 23, as WWPC claims.

In view of the fact that the Committee on Commerce adopted Pinchot's suggested change in language to the extent that it was applicable to H.R. 3184, we

have concluded, as indicated, that Congress intended that the FWPA would neither diminish nor enlarge rights under pre-FWPA permits. Consistent therewith, Opinion No. 117 does not diminish WWPC's rights under its 1906 and 1908 permits to continue to occupy lands of the Spokane Indian Reservation and utilize waters of the Spokane River for its Little Falls hydro-electric development. And it does not enlarge WWPC's rights thereunder by permitting WWPC to continue to operate and maintain its dam in the river and thus occupy the waters without obtaining a license as later required by the first sentence of Section 23(b).

Opinion No. 117 strikes a balance between preserving the authority of pre-FWPA permits, and refraining from enlarging that authority, consistent with current requirements.

Several of WWPC's allegations of error appear to be bottomed on loose language that invariably slips into briefs, as well as opinions and orders, to the effect that the Commission licenses hydro-electric projects, or, somewhat more specific but still loose, that the Commission licenses the construction, operation and maintenance of such projects or developments. WWPC contends, in this connection, in its Error No. 2, that Section 23(a) "exempts the Little Falls Development from licensing." That contention is inaccurate.

Section 23(a) is a grandfather provision that says, in substance, that the other provisions of Part I of the FPA shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, or the authority thereunder. Therefore, the Commission must look to the terms of such

permits and the authority thereunder, and interpret those terms and that authority, to determine whether the continued operation and maintenance of an existing hydroelectric development is exempted thereunder from licensing, or whether less-inclusive continuing activities (if any) associated with an existing hydro-electric development are exempted thereunder from licensing.[27]

Opinion No. 117 states, at 26 and 27, that WWPC's permitted interest in the 108 acres and its permitted right to utilize 10,000 cfs of the flow of the Spokane River are property rights for which WWPC is entitled to "just compensation" in the constitutional sense if that interest and right are transferred to another in connection with a relicensing or takeover under the provisions of the FPA. Upon further consideration, we are persuaded that Opinion No. 117 is wrong in that

respect, and that WWPC would be entitled to the compensation specified in Sections 14(a) and 15(a) of the FPA, "actual legitimate original cost" "net investment," as in the case of *The Montana Power Company*, for its Holter water power development.

As more fully discussed in *The Montana Power Company*, 7 FPC 163 (1948), the Secretaries of the Interior and Agriculture on April 22, 1920, granted a permit to The Montana Power Company under the Act of February 15, 1901, to utilize certain lands of the United States for its Holter development on the Missouri River. The Holter dam had been constructed purportedly pursuant to a special statute enacted on April 12, 1906 (34 Stat. 111), but the Commission found in 1948 that it had been constructed in violation of the time limits of that statute and, consequently, that The Montana Power

Company had pre-FWPA authority to occupy lands but no such authority to occupy navigable waters. In this respect, the Little Falls development has precisely the same status as did the Holter development, which is the only other situation to our knowledge in which there was pre-FWPA authority to occupy lands but not waters. The Commission said, at 182,

> But it is clear that the Holter land permit did not, nor could it, authorize the occupancy of navigable waters of the United States. The 1901 land-permit statute contains no suggestion of such authority. It is a public-land, right- of-way statute, and no more. In addition, only a short time before, Congress had enacted the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1121, 1151) empowering the Secretary of War to approve the location of obstructions in navigable waters. The 1901 statute did not expressly repeal the 1899 statute, and there is no repeal by implication since no necessary conflict exists between the two. In short, each statute stands alone, and a

> grant under one confers no right obtainable under the other (cf. *United States v. Arizona*, 295, U.S. 174). [28]
>
> * * *
>
> Despite its admittedly valid permit to occupy public lands, which will continue unaffected, the Company lacks authority for its Holter dam located in a "navigable water," and is therefore required to apply for license under Part I of the Act.

The Commission was affirmed in relevant part in *The Montana Power Company v. Federal Power Commission*, 185 F.2d 491 (D.C. Cir. 1950).[29] Thereafter, the works of the Holter development were licensed as part of The Montana Power Company's Project No. 2188, and we take official notice of Article 33 of that license, which provided,

> *Article 33.* The actual legitimate original cost, estimated where not known, and the accrued depreciation of the parts of the project completed prior to the effective date of the license (December 1, 1948) shall be determined by the

> Commission as of such effective date, in accordance with the Act and the rules and regulations of the Commission, and such cost less such accrued depreciation, so determined, shall be the net investment in the project as of such effective date.

WWPC's permits issued November 3, 1906, and August 29, 1908, authorize the occupation of lands of the Spokane Indian Reservation and the utilization of the waters of the Spokane River for the development of water power. WWPC has a property right thereunder by which it is entitled to continue to operate and maintain the Little Falls development without diminution or enlargement of its pre-FWPA status. We have determined that the Secretary of the Interior was not empowered by the Act of March 3, 1905, to authorize the construction of a dam in the Spokane River. We have also determined that WWPC was required by Section 9 of the Rivers and Harbors Appropriation Act of

1899 to obtain the direct consent of Congress for the construction of its dam, and of the Chief of Engineers and the Secretary of War, and that WWPC did not do so. Therefore, WWPC's authority under its 1906 and 1908 permits is incomplete, and, as indicated in Opinion No. 117, at 23, WWPC is required by the first sentence of Section 23(b) either to cease operating its dam, or to obtain a license under the FPA for the continued operation and maintenance of its Little Falls development. Such a license would not require payment of annual charges for the continued use, occupancy and enjoyment of WWPC's permitted lands.

During the hearings and debates on the FWPA, Congress was confronted with the interacting problems of (1) protecting the public against excessive profits by licensees who would utilize the lands and waters of the United States to generate

electric power, and (2) allowing sufficient profits to provide incentives for constructing and financing water power projects. Congress chose to leave the regulation of electric rates to the States and, therefore, approached both problems through the regulation of profits. That regulation was embodied in the "net investment" concept which, in its simplest terms, would assure a return of investment through profits to the extent earned, and through a payment at or after the end of the term of the license to the extent that the investment was not previously recovered through profits. "After long negotiation and many conferences, representatives of the largest operating companies and of the leading investment bankers have agreed that the cost basis as above stated will be satisfactory from an investment standpoint, that money for development can be secured, if such basis

is expressed in definite language in the bill." O.C. Merrill's Memorandum to the Secretary, 42 FPC, at 345.

The hearings and debates on the FWPA took place during the period of World War I and the post-war inflation, which was thought to be a cyclical and temporary matter, to be followed by depression. In such an atmosphere, those who wanted to protect utility investments from being eroded by deflation became proponents of a cost-based "net investment" takeover and relicensing price, and opponents of a value-based "fair value" takeover and relicensing price. *See* 42 FPC, at 334.[30]

Section 3(13) of the FPA thus defines "net investment" in terms of "actual legitimate original cost." And Sections 14(a) and 15(a), respectively, assure the recovery of a licensee's investment, not to exceed the fair value of the property taken, either during the term of a

license, or at or after its expiration upon takeover by the United States or transfer to a different licensee.

As more fully discussed in Opinion No. 36-A (*Escondido Mutual Water Company, et al.*, Project No. 176), issued November 26, 1979 [9 FERC ¶ 61,241], the takeover or relicensing price is computed as follows:

$$\text{transfer price on takeover or relicensing} = \frac{\text{net investment (viz., actual - earnings in excess of a fair return on such investment}}{}$$

In the case of a hydro-electric development that does not recover any of its cost from excess earnings, the transfer price will be the original cost (limited by the fair value). But in the case of a development that recovers all of its cost from excess earnings, the transfer price will be zero. In other words, a licensee is assured of a "fair return" on its "net investment," and is also assured of recovering its "net

investment" either from earnings in excess of that return during the term of its license, or from a transfer payment made at or after the expiration of its license. *See* 40 FPC, at 941.

Such "actual legitimate original cost" "net investment" is applicable to all licenses with the exception of one class. The proviso to Section 23(a) states that when the holder or possessor of a pre-FWPA permit, right-of-way or authority, elects to exchange the permit, right-of-way or authority for a license for a constructed project, the "fair value" of the project as of the date of the license shall be the "net investment." Licenses issued pursuant to the authority of Section 23(a) are thus called "fair value" licenses.[31]

As discussed in Opinion No. 117, at 4, Section 23(a) of the FPA provides an option for those who, on June 10, 1920,

had authority to occupy government lands and navigable waters. They can continue to occupy those lands and waters under their existing authority, in which case they will be entitled to "just compensation" in the constitutional sense if their occupancy rights are taken through the power of eminent domain. Or they can exchange their authority for a license under the FPA, in which case their occupancy rights can be transferred at or after the expiration of the license for a payment of "fair value" "net investment".

While we equate "fair value" in the sense of the proviso to Section 23(a), to "just compensation" in the constitutional sense, for present purposes, "fair value" "net investment" inherently provides a smaller payment than "just compensation."[32] That is because "fair value" is determined at the beginning of a license, and is subject to a deduction of

"earnings in excess of a fair return on such investment," whereas "just compensation" is determined at the time of a taking, and is not subject to such a deduction. In other words, a pre-FWPA permittee electing to continue to occupy lands and waters under existing authority, will receive the value of its property taken under the power of eminent domain, and will keep all prior earnings on that property. But a pre-FWPA permittee electing to exchange its authority for a license, will receive the value of its property transferred on takeover or relicensing, less the earnings in excess of a fair return on that property during the term of the license, and will keep the prior earnings constituting the fair return during the term of the license, and all earnings on that property prior to the license.

Furthermore, Congress provided a scheme by which those who sought licenses for developments to be constructed, whether voluntarily or by coercion of Section 9 of the Rivers and Harbors Appropriation Act of 1899 or Section 23(b) of the FPA, were subjected to a cost-based "net investment." And those who were coerced to seek licenses for *existing developments without pre-FWPA authority* were subject to the same cost-based "net investment." Only those who have a choice of continuing to utilize authority that existed before the FWPA, or exchanging it for authority under the FPA, are subjected to a value-based "net investment." That choice does not exist when there is pre-FWPA authority to occupy lands but not water and, therefore, those who are coerced by Section 23(b) to seek licenses for existing developments with pre-FWPA authority to occupy lands but not waters,

are subjected to cost-based "net investment."

In *Niagara Falls Power Co. v. Federal Power Commission*, 137 F.2d 787 (2nd Cir. 1943), Judge Learned Hand addressed a possible reason why Congress provided "fair value" "net investment," instead of "actual legitimate original cost" "net investment," for such voluntary exchanges, at 791:

> . . . Although Congress of course meant to exclude certain existing "projects" from the new system, in general its purpose was to set up a system of comprehensive regulation of water power. We must assume that it may have felt its hands tied to some extent; the Supreme Court both before and since 1920, has held indefeasible a grant, once made and acted upon. *United States v. Central Pac. R. Co.*, 118 U.S. 235, 238, 6 S.Ct. 1038, 30 L.Ed. 173; *United States v. Northern Pac. R. Co.*, 256 U.S. 51, 63, 64, 41 S.Ct. 439, 65 L.Ed. 825. There are said to have been many valid licenses outstanding in 1920, issued by federal authorities

> which it was at least doubtful whether Congress could "affect" at all; § 23(a) excluded these and they adequately account for its enactment.[33]

Having found no indication that Congress considered the problem involved herein of pre-FWPA authority to occupy lands but not waters, we are persuaded by the legislative history of the first paragraph of Section 23 of the FWPA, which is now Section 23(a) of the FPA, as to following: All the way through Congress, until the very end, the first paragraph of Section 23 said that existing authority would not be *revoked* by the new law, but could be exchanged for authority under the new law. And nothing more. The adoption of Pinchot's suggested "verbal change," as it was later called, from "revoked" to "affected," indicated that Congress intended to neither enlarge nor diminish existing authority, and that the forepart of the first paragraph of Section 23 still

meant that existing authority would be *preserved* unless voluntarily exchanged for authority under the new law. Section 29, repealing inconsistent statutes, would not apply to existing authority under those statutes.

But the adoption of Pinchot's suggested proviso, pertaining to future transfer prices when existing authority would be exchanged for authority under the new law, indicates that the forepart of the paragraph, saying that existing authority would not be revoked or affected, was speaking of the existing authority for operating and maintaining hydro-electric developments, and was not addressing future transfer prices. *Congress used the proviso to address future transfer prices*, fixing "fair value" "net investment" as the transfer price in cases of *voluntary* exchange, and remaining silent as to the transfer price

in cases of continued utilization of existing authority. It was not necessary to address the transfer price as to the latter class of cases since they would be covered by the "just compensation" clause of the Constitution.[34]

We have therefore concluded, as indicated, that we read the word "affected" too broadly and, therefore, that Opinion No. 117 is wrong insofar as it indicates, at 26 and 27, that Section 23(a) protects WWPC's constitutional right to "just compensation" for its permitted property interest in the 108 acres if the Little Falls development is in the future taken over by the United States or transferred to another in a relicensing. WWPC will be compensated, if at all, on the basis of its "actual legitimate original cost" "net investment," plus any severance damages.

While WWPC's 1906 and 1908 permits authorize the utilization of 10,000 cfs of the flow of the Spokane River for the development of water power, it appears upon reconsideration that WWPC may not be entitled to *any* compensation for that authorization if it is taken over by the United States or transferred to another in a relicensing. In addition to our conclusion that Section 23(a) does not address future transfer prices, other than as expressly set forth in the proviso, WWPC's authorization to so utilize the waters would not be within the scope of Section 23(a) to the extent that it is derived from the State of Washington[35] and may not be a property right in the constitutional sense to the extent that it is derived from the Secretary of the Interior.[36]

The Supreme Court held, in this connection, in *United States v. Chandler-*

Dunbar Water Power Company, 229 U.S. 53 (1913), that a private right to utilize waters of a navigable waterway for the development of water power is subordinate to the public right to utilize the waters for navigation and, therefore, the owner of the water power right does not lose a property right in the constitutional sense, and is not entitled to compensation, when the use of the waters is taken for the dominant public right of navigation.

In *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), the Supreme Court appears to have enlarged its Chandler-Dunbar holding, and to have held that an identical private right to utilize waters of a navigable waterway *for the development of water power*, is subordinate to all public rights to utilize the waters that are within the commerce power of Congress, including the

public right to utilize the waters for the development of water power. Therefore, the owner of the private power right would not lose a property right in the constitutional sense, and would not be entitled to compensation, when the use of the waters is taken for the dominant public power right. The Supreme Court said, in this connection, 311 U.S., at 424 (emphasis added),

> The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits *without compensation* is entirely within the Government's discretion."
>
> ["] *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 66, 69, 76; cf. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330.]

The Supreme Court also said, 311 U.S., at 426, that the authority of Congress "is as broad as the needs of commerce," and that the utilization of navigable waters for water power is as much a commercial use of the waters as their utilization for navigation. And the Supreme Court concluded, at 427 (emphasis added; citations omitted),

> It has been shown, note 77, *supra*, that there is no private property in the flow of the stream. This has no assessable value to the riparian owner. If the Government were now to build the dam, it would have to pay the fair value, judicially determined, for the fast land; *nothing for the water power.*

We have therefore reached no conclusion as to whether any values are allowable for water rights under Section 14(a) of the FPA in the light of the foregoing Supreme Court decisions. That issue should be addressed in a proceeding

in which there are parties who will be affected by the decision.

Scope of the License Amendment

Having determined that WWPC is required by Section 23(b) of the FPA to amend its license for Project No. 2545 to include the continued operation and maintenance of the works of the Little Falls development, we turn to the question of whether WWPC has an option under Section 23(a) to continue to operate and maintain those works under and to the extent of the authority of its 1906 and 1908 permits, or to exchange that authority for new authority under the FPA. As discussed *supra*, at 35-36, Congress used the proviso of the first paragraph of Section 23 of the FWPA, which is now Section 23(a) of the FPA, to fix transfer prices in cases of *voluntary* applications for licenses authorized in the forepart of that section. Accordingly, we are

persuaded by the legislative history that when government lands *and* navigable waters are occupied for the development of water power, the option to continue to utilize existing authority, or to exchange it for new authority under the FPA, applies only to those situations in which valid authority to occupy government lands *and* navigable waters co-existed on June 10, 1920. And we have concluded, consistent with *The Montana Power Company*, *supra*, that since WWPC does not have pre-FWPA authority to occupy navigable waters, it does not have an option to utilize or exchange the authority under its 1906 and 1908 permits, contrary to Opinion No. 117, at 25. Accordingly, the last six paragraphs of that Opinion are hereby superseded (except that notes 36 and 37 are retained).

All or part of the 108 acres and WWPC's fee simple lands, the use and

occupancy of which are necessary or appropriate in the maintenance and operation of the Little Falls development, should be included within the project boundary to the extent required by the Commission's Regulations under the FPA. Similarly, the right to utilize 10,000 cfs of the flow of the Spokane River which is necessary or appropriate in the operation of the development, should be included within the license. The 108 acres, or the part thereof within the project boundary, and the 10,000 cfs, will thus become part of the "project adopted . . . such as in the judgment of the Commission will be best adapted to a comprehensive plan for . . . beneficial public uses," within the purview of Section 10(a) of the FPA. And the Commission's authority over the permitted lands, waters and physical structures, will be as full and complete as though no permits exist.

Section 10(e) of the FPA requires the Commission to fix annual charges for the purpose of (1) reimbursing the United States for the costs of administering Part I of the FPA and (2) recompensing the United States "for the use, occupancy, and enjoyment of its lands or other property." The payment of annual charges for administering Part I of the FPA is a burden of the license that is properly payable by WWPC as part of the price for the privilege of operating and maintaining the Little Falls dam in the Spokane River. But, as discussed in Opinion No. 117, at 11-15, we perceive WWPC's interest in the 108 acres as a right, to use, occupy and enjoy those lands for the development of water power, indefinitely, as long as the lands are so used. While the United States has a reserved interest in those lands, it does not have a present and ongoing right of occupancy.[37] As a result, the permitted

lands are not "its lands," meaning lands of the United States, for the purpose of recompensing the United States pursuant to Section 10(e) for their present and ongoing use, occupancy and enjoyment. And, as a further result, there will be no annual charges for WWPC's use, occupancy and enjoyment of the permitted lands brought under license.

Opinion No. 117 indicates, at 12, that the issue of the validity of the grants under the Act of March 3, 1905, was not reached because the 108 acres are "reservations" within the purview of Section 3(2) of the FPA whether or not the grants were void. And the Opinion reflects that notion at 26, n. 35, which states that the Spokane Indian Tribe would be entitled to annual charges if the grants are challenged successfully in litigation initiated for that purpose. On further consideration, however, the findings in

Opinion No. 117 and herein to the effect that WWPC has valid permits that were granted by the Secretary of the Interior on November 3, 1906, and August 29, 1908, could be construed by a court as being decisive of the validity of the grants because WWPC's interests in the 108 acres are derived through the permits. In other words, the permits authorized the purchase of the property interests that are the grants, and, therefore, all issues pertaining to the validity of the grants are arguably subsumed within the issues pertaining to the validity of the permits. Since the Spokane Indian Tribe is a party to this proceeding, it may be bound by the findings that WWPC has valid permits and may be unable to pursue separate litigation to challenge the grants.[38]

Although Wilson appropriated the flow of the Spokane River only for the purpose of developing water power, he sought the

right to erect and maintain the project works "for the development of power [,] for the diversion of water for irrigation and other beneficial use of said water." WWPC, on the other hand, appropriated the flow for the purposes of irrigation and developing water power, and sought the right to use the water and acquire the land "for the development of power and for the beneficial use of the water," closely tracking the statutory language. The Secretary of the Interior endorsed his approval in both cases, and therefore, we conclude that WWPC's 1906 and 1908 permits cover all beneficial public uses of the water, as does Section 10(a) of the FPA. As a result, there will be no conflicts between the terms of the permits and the requirements of the FPA if at some future time it is determined that some or all of the water should be used for beneficial

public purposes other than the development of hydro-electric power.

In summary, the Little Falls development will be fully subject to the provisions of Part I of the FPA, except with respect to the payment of annual charges for the use, occupancy and enjoyment of the 108 acres, or the part thereof within the project boundary.

Deferral of Filing Obligation and Denial of Oral Argument

Many of the permits and rights-of-way for the development of water power that were granted before June 10, 1920, were either revocable at will, or were granted for periods of 50 years or less, and many have been revoked or have expired. However, 99-year permits were granted and have not yet expired, and some permits of indefinite duration were also granted.

The Act of March 3, 1905, was special legislation pertaining to an Indian

reservation on a segment of one river and, to our knowledge, only two power sites were permitted under that Act. The Little Falls site is the subject of this proceeding, and a downstream site was condemned after the *Big Bend* decision and became part of the Grand Coulee development.

In Opinion No. 117 and this Opinion No. 117-A on rehearing, we have determined that WWPC has two valid permits that were granted under the Act of March 3, 1905. We have also interpreted the terms of those permits to determine whether a license under the FPA is required. And we have determined that the permits are ones of indefinite duration, and that such a license is required.

Insofar as this proceeding involves permits of indefinite duration for partial authority for the occupation of lands and waters for the development of water power,

we regard as unique the ongoing interaction of the authority under the permits, and the requirements of, and the authority under, the Federal Power Act. Accordingly, we will in our discretion modify Ordering Paragraph (B) of Opinion No. 117 to begin, "Within 90 days of the date on which this Opinion and order becomes final and nonappealable . . . " WWPC's obligation thereunder to file an application to amend its license for Project No. 2545 will thereby be deferred until after the completion of judicial review, and its motion for a stay will thereby be mooted. The other changes to Ordering Paragraph (B) are technical ones for conformity to this Opinion No. 117-A.

Furthermore, we will in our discretion also deny WWPC's motion for oral argument.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed May 8, 1981, by The Washington Water Power Company, present no facts or legal principles which would warrant any change in or modification of Opinion No. 117 and order issued April 8, 1981, except as that Opinion and order is modified and clarified herein.

The Commission further finds in lieu of the fifth additional finding and conclusion of the presiding judge, as previously modified by the Commission:

The Washington Water Power Company operates and maintains the Little Falls Dam in and across the Spokane River, a navigable water of the United States within the State of Washington, together with conduits, a power house, and other works of the Little Falls project incidental to the development of electric power across, along or in the Spokane

River, partly under and in accordance with the terms of two permits granted prior to June 10, 1920, and partly without having a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the Federal Power Act, in violation of Section 23(b) of the Federal Power Act.

The Commission orders:

(A) The application for rehearing of Opinion No. 117 filed by The Washington Water Power Company on May 8, 1981, is denied.

(B) Ordering Paragraph (B) of Opinion No. 117 is hereby modified to read as follows:

> (B) Within 90 days of the date on which this Opinion and order becomes final and nonappealable, The Washington Water Power Company shall file an application pursuant to the Federal Power Act and the Commission's Rules and Regulations thereunder to amend

its license for Project No. 2545 to include as part of the project the Little Falls development. The license amendment will not provide for annual charges for the use, occupancy and enjoyment of the interests in the lands brought under license that were purchased under and pursuant to the permits granted by the Secretary of the Interior on November 3, 1906, and August 29, 1908.

(C) The motion for oral argument filed by The Washington Water Power Company on May 8, 1981, is denied.

Chairman Butler *dissented* with a separate statement attached.

-Footnotes-

[1] The substance of Section 1.31(c) is now contained in Rule 711(d) of the Commission's Rules of Practice and Procedure.

[2] The Grand Coulee development was authorized by Section 2 of the Act of August 30, 1935, 49 Stat. 1028, at 1039-40, for the purpose, among others, of "improving navigation."

In this connection, we take official notice of the United States Geological Survey's 1973 Little Falls

Quadrangle, Washington, 7.5 minute series topographic map, which labels the river below the dam as the Spokane River *and* Franklin D. Roosevelt Lake, and shows the Coulee Dam National Recreation Area as embracing land on both sides of the river to the Little Falls dam, including the area surrounding the Little Falls powerhouse. The Grand Coulee development was authorized by Section 2 of the Act of August 30, 1935, 49 Stat. 1028, at 1039-40, for the purpose, among others, of "improving navigation."

[3] The water stored in Long Lake is subject to multiple beneficial public uses under WWPC's license for Project No. 2545. Since the Little Falls dam is operated in hydraulic coordination with the Long Lake dam less than five miles upstream, and since there is no storage and only pondage at Little Falls, the Little Falls dam must, as a practicable matter, also be operated for multiple beneficial public uses, rather than the single use of generating electric power.

[4] In *Federal Power Commission v. Union Electric Co.*, 381 U.S 90 (1965), the Supreme Court held that "Congress has required a license for a water power project utilizing the [nonnavigable] headwaters of a navigable river to generate energy for an interstate power system." But in *Farmington River Power Co. v. Federal Power Commission*, 455 F.2d 86 (1972), the Second Circuit held that a license is not required for a dam constructed prior to 1935 across a nonnavigable stream.

Since the term "project" is defined in Section 3(11) of the FPA to mean a "complete unit of improvement or development, consisting of . . . all dams and appurtenant works and structures . . . which are a part of said unit," projects sometimes consist of more than one development. As

licensed in 1972 (48 FPC 339), Project No. 2545 consisted of WWPC's Upper Falls, Monroe Street, Nine Mile and Long Lake developments, which were found (48 FPC, at 348) to be subject to the Commission's licensing jurisdiction as affecting "the interests of interstate commerce." The navigability of the Spokane River didn't matter because, even if the river was nonnavigable, it is a headwater of the navigable Columbia River (*Union Electric*), and the developments that were licensed included significant improvements after 1935 (*Farmington*).

As appears from the record of this proceeding, the works of the Post Falls development, which were included in the license later, and those of the Upper Falls development, occupy a part of the Spokane River that was and is navigable in fact because it was used as a highway for sawlog commerce. Thus, various works of Project No. 2545 are required to be licensed, and are licensed, for different reasons.

Since the Commission licenses the construction, operation and maintenance of "project works," which are defined in Section 3(12) of the FPA as "the physical structures of a project," rather than "projects" as such, the Commission ordinarily licenses all of the works of a "project" (whether or not it consists of more than one development) if any of the works of the "project" are required to be licensed. All works under common ownership ordinarily are covered by the same license, whereas works under co-ownership or different ownership are covered by a joint or separate license that is coordinated in its terms--to the end that all of the works of a "project" are covered by a license.

The hydraulic coordination of developments is a strong if not irrefutable indication that two or more developments should be treated as parts of the same complete unit of improvement, *i.e.*, as a single "project," because the implication is that the combined operation produces a greater economic value than if the developments were operated separately. Therefore, when a development, such as Little Falls, is operated in hydraulic coordination with another development that is required to be licensed, the Commission ordinarily requires the works of the coordinated development to be licensed as part of the same "project," even though there may not be an independent requirement for licensing the works of the coordinated development (such as navigability at the site of the coordinated development, or the construction of works of a coordinated development on a nonnavigable stream after 1935).

Accordingly, WWPC's concession that the Little Falls development is operated in hydraulic coordination with the other developments of Project No. 2545 is a strong if not irrefutable admission that it must have a permit or license to operate and maintain the works of the Little Falls development without regard to whether the Spokane River was or is navigable at that site.

[5] The courts have recognized the flotation of sawlogs as being important in determining the navigability of waterways for purposes of the FPA. *See*, for example, *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785 (9th Cir. 1981) (shingle bolts); The *Connecticut Light and Power Co. v. Federal Power Commission*, 557 F.2d 349 (2nd Cir. 1977); *State of Wisconsin v. Federal Power Commission*, 214 F.2d 334 (7th

Cir. 1954); and *Wisconsin Public Service Commission v. Federal Power Commission*, 147 F.2d 743 (7th Cir. 1945).

[6] 1981 Guinness Book of World Records, at 269.

[7] The spillway of the Grand Coulee dam is at an elevation of 1,289 feet m.s.l. according to the Little Falls Quadrangle map, and the tail water of the Little Falls development is at 1,286 feet m.s.l. according to Exhibit No. 105. Of the 60 end-of-month surface elevations of Franklin D. Roosevelt Lake shown in Exhibit No. 137, one-half are below the 1,286-foot level, generally in the Spring months when the lake is presumably evacuated for flood control purposes.

[8] *See United States v. Big Ben Transit Company*, 42 F. Supp. 459 (E.D. Wash. 1941), at 470.

[9] We take official notice of the 1983 Annual Report of the Chief of Engineers, United States Army, to the Secretary of War, Part I, at 446, and Part IV, at 3458-3461. The preliminary examination was authorized by the Act of July 13, 1892 (27 Stat. 88), under which it was to be determined (1) whether the river was "worthy of improvement by the General Government... including the present and prospective demands of commerce" and, if so, (2) the cost of a survey "with the view of submitting plan and estimate for its improvement." Captain Symons reported that in his opinion the river was worthy of such improvement "to the extent of providing an all-the-year navigation for boats drawing 3 feet of water, provided a careful survey shows the practicability of making the improvement at a moderate cost and without seriously interfering with vested interests." Captain Symons' superior supported him, but the Chief of Engineers reported to the Secretary of War that in the judgment of his office the

river was not worthy of improvement by the General Government.

The Chief of Engineers did not explain why he thought the river was not worthy of improvement. Captain Symons' physical description indicates that steamers on Coeur d'Alene Lake could reach Post Falls throughout the year if a three-foot channel was provided, either by clearance and dredging, or by raising the dam at Post Falls. He expressed apprehension, however, that a channel through the bar at the source of the river might be detrimental to the utilization of Coeur d'Alene Lake as a storage reservoir and, consequently, reduce the flow available for the vested water power and manufacturing interests at Post Falls and Spokane. And he indicated that he understood that the power interests at Post Falls, rather than the General Government, would finance a raising of the dam, which appeared from an accompanying letter to be the preferable course.

Captain Symons examined the river in the latter part of July 1892 and reported on September 7th that there was, "at present, no navigation on this portion of the river on account of the shallowness of the water at the low stages of the lake and river." An accompanying letter on behalf of the mayor of Post Falls dated July 26, 1892, called the bars "riffles" and said (emphasis added),

> As it is now, during the months of July, August, and September, the period of low water, navigation is *practically* suspended, there being only 20 to 24 inches of water on the riffles, and the obstacles in form to make steamboating *difficult*. As the summer is the vital time, navigation here has therefore received no systematic encouragement.

The words "practically" and "difficult" (rather than "impossible") suggest that there was some steamboating to Post Falls in periods of low water, if not also in periods of higher water. Certainly, if the river was marginal for steamboats, it was susceptible of being used for commerce by lesser craft.

[10] Opinion No. 117, at 19, n. 26.

[11] Limitations of Federal Control of Water Powers, An Argument before The National Waterways Commission, by Hon. Rome G. Brown, published in 1912 as Senate Document No. 721, 62nd Congress, 2nd Session, at 39.

See, *also*, 27 Op. Atty. Gen. 120 (1908), to the effect that the consent of Congress was needed for the construction of a bridge over a non-navigable portion of a navigable river. Furthermore, in the Application for Rehearing, at 9, WWPC challenges navigability only downstream from Spokane, conceding by implication navigability upstream in Washington and Idaho.

In *Cummings v. Chicago*, 188 U.S. 410 (1903), the Supreme Court said, at 431, that the effect of the Rivers and Harbors Appropriation Act of 1899, reasonably interpreted,

> is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under

existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies. In other words, when the navigable portions of a waterway were wholly within a single State, the Secretary of War consented on behalf of Congress pursuant to the Secretary's delegated authority, as does the Commission today within its sphere of authority under the FPA.

[12] We take official notice, in this connection, of the 1905 Annual Report of the Chief of Engineers, United States Army, at 726.

[13] Additionally, the 1881 and 1892 Symons excursions establish that the river was navigable in the sense of *The Daniel Ball* at both its mouth in Washington and its source in Idaho. Statements to the contrary should be read in the context of navigability for the present movement of troops, equipment and supplies along the middle reach of the river.

Considering that Captain Symons' report shows that the river was clearly capable in its natural condition of floating sawlogs almost 9 miles from Coeur d'Alene Lake to Post Falls, Idaho; that Post Falls is less than 6 miles from the Idaho-Washington boundary; and that the configuration of the river at Post Falls did not preclude its use for floating sawlogs another 22 miles to Spokane, Washington, WWPC was required by Section 9 of the 1899 statute, or at least by the proviso of Section 9, to submit its plans for the Little Falls dam to the Chief of Engineers and the Secretary of War because the river was being used for commerce in its ordinary condition in at least one State. And if WWPC had done so, presumably it would have obtained the consent of

Congress, either directly by legislation, or through the Secretary of War as discussed in *Cummings v. Chicago*, *supra*, at n. 11.

[14] Senate Report No. 4378, 58th Congress, 3rd Session.

[15] As used in that statute, the word would apply to structures as small as minor barriers controlling the flow of irrigation ditches.

[16] The Act of March 3, 1905, in common with other statutes enacted prior to June 10, 1920, empowered a unit of government to authorize the occupation of lands and the utilization of waters over which Congress had jurisdiction under one or more of its delegated powers. Similarly, the FPA empowers the Commission to authorize the occupation of some of those lands and waters for the development of water power. But unlike some of those pre-FWPA statutes, the FPA expressly empowers the Commission to authorize certain activities (construction, operation and maintenance) of "project works," which are the physical structures of a project, and prohibits the same activities with respect to such "works" without having a pre-FWPA permit or a license. Nonetheless, we are persuaded that WWPC's 1906 and 1908 permits (*see* WWPC's PERMITS, *infra*) include *implied* authorization to operate and maintain all of the physical structures of its Little Falls development that occupy the permitted lands, to the extent they do not also occupy the permitted waters. We are so persuaded because express authorization to occupy lands and utilize waters *for* specified purposes, as in Section 2 of the Act of March 3, 1905, would appear to include implied authorization to engage in the activities that are necessary to carry on those purposes. But the Act of March 3, 1905, was an exercise of the

authority of Congress over government lands (and waters incident to those lands), and did not supersede the 1899 statute, which was an exercise of the authority of Congress over commerce, and prohibited unauthorized structures in navigable waters.

[17] Consistent with the premise that the Secretary of the Interior was empowered by the Act of March 3, 1905, to authorize the construction of dams in the river, the court did not address and, therefore, presumably did not consider the prohibitions of Section 9 of the Rivers and Harbors Appropriation Act of 1899 and the first sentence of Section 23(b) of the FPA.

In this proceeding, David Wilson and WWPC both sought authority for a dam across the Spokane River, and Interior may have thought that it was empowered to grant such authority. Our point is that the Secretary of the Interior was not empowered to grant such authority, and that the intent of Congress as shown by the legislative history must control over any interpretation to the contrary.

[18] As discussed, *infra*, the Department of the Interior treated the Act of March 3, 1905, as a right-of-way statute similar to the one from which it was derived. Pre-FWPA permits and rights-of-way are treated the same under Section 23(a) of the FPA.

[19] While rehearing of WWPC's Error No. 7 is thus granted, it does not change the result and, therefore, this Opinion No. 117-A on rehearing is entitled a denial of rehearing.

[20] While the concept of a transfer application produces a rationale that is consistent with Section 3 of the Act of March 3, 1905, that was not the only possible alternative. The Secretary of the Interior could have decided that Wilson had not applied in good faith, as discussed by the judge, or that Wilson ceased to hold the permitted lands for the permitted purposes when he agreed to the transfer to WWPC. In either such case, and again, in fairness to WWPC, he should have suggested the filing of an amendment to WWPC's application to cover and pay for the 100 acres that would no longer have been considered as being permitted to Wilson.

[21] Affirmed sub nom. *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785 (9th Cir. 1981).

[22] The new first sentence was added at the beginning of the former second paragraph of Section 23, and did not replace anything.

[23] WWPC also relies on the similar explanation in House Report No. 1318, 74th Congress, 1st Session, at 25.

[24] The comparable sentences in House Report No. 1318, 74th Congress, 1st Session, said (emphasis added),

> . . . The second paragraph of section 23, here lettered subsection (b), is also amended by expressly making unlawful the *construction* of any dam, water conduit, reservoir, or power house in any of the navigable waters of the United States, or upon any of the public lands or reservations of the United States,

except pursuant to a permit granted prior to June 10, 1920, or a license granted pursuant to the act.

This provision is in substance the *present result under* the River and Harbor Act of 1899 and the Water Power Act.

In other words, the 1899 statute prohibited the construction of dams and other obstructions in navigable waterways without the consent of Congress. Congress in 1920 delegated to the Commission the authority to consent to the construction in navigable waterways of dams and other obstructions for the development of power. And Congress said in the House and Senate reports in 1935 that it wasn't changing anything--that it was adding the first sentence of Section 23(b) to express in the FPA the combined result under the 1899 and 1920 statutes.

[25] *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925), at 429.

[26] See House Report No. 910, 66th Congress, 2d Session, dated April 30, 1920, designated as the Conference Report.

[27] The Commission is expressly required by the first sentence of Section 23(b) to look to and interpret the terms of pre-FWPA permits.

[28] The Act of March 3, 1905, was derived from the Act of February 15, 1901, and was also a "public-land, right-of-way" statute. It authorized the occupancy of reservation lands and the utilization of the waters on those lands, but not the occupancy of those waters over those lands. And it did not repeal the 1899 statute expressly or by implication.

[29] The Court of Appeals said, at 496,

> Land permit statutes enacted subsequent to 1899, under which petitioner now asserts authority for Holter, merely supplemented the 1899 Act and did not remove the separate license requirement contained therein. Thus, a general grant of authority to the Secretary of the Interior to build reservoirs in aid of reclamation did not carry with it consent to obstruct navigable waters. Additional authorization therefor from the Secretary of War was held to be necessary", citing *United States v. Arizona*, 295 U.S. 174, 191, 55 S.Ct. 666, 79 L.Ed. 1371 (1935).

[30] The deflation came as expected, in the early 1920's, and was followed by a period of inflation in the middle to late 1920's. Then came the depression of the 1930's, and near continuous inflation to the current time. In the light of the experience of the past 62 years, those who favored a cost-based transfer price, today, undoubtedly would favor a value-based price.

[31] In the wake of inflation, such a value-based "net investment" will be a higher figure than cost-based "net investment." But that was not so at the time of the debates on the FWPA, when deflation was expected. As discussed, *infra*, value-based "net investment" was simply a method o f fixing a "net investment" figure for existing projects for which cost records were not maintained prior to the FWPA.

[32] In the wake of inflation, "just compensation" at the time of taking will provide a higher figure than "fair value" at the beginning of a license, because of the time lag. The

discussion that follows assumes that "fair value" does not change during the term of a license.

[33] The proviso to Section 23(a) was suggested by Pinchot to Senator Jones to provide a method for determining "net investment" when pre-FWPA permits are surrendered for licenses. It was thus added by the Committee on Commerce and modified by the Committee of Conference. As explained in the Conference Report, *supra*, at 13, "This amendment provides for the determination of the valuation of projects already constructed when application is made for a license to come under the provisions of the act."

[34] Even if the part of Section 23(a) that says that Part I of the FPA shall not be construed as affecting pre-FWPA permits and authority, is construed as addressing transfer prices (contrary to our conclusion), Opinion No. 117 and this Opinion No. 117-A on rehearing requiring licensing do not affect those permits or that authority. WWPC had incomplete authority before June 10, 1920, because it was prohibited by Section 9 of the Rivers and Harbors Appropriation Act of 1899 from constructing a dam at Little Falls, and its 1906 and 1908 permits did not confer authority to maintain that dam; and, as a result, WWPC has incomplete authority today. WWPC has always operated the Little Falls development illegally, and the transfer price of its partial authority should reflect that fact under any scheme of compensation.

[35] *Bellows Falls Hydro-electric Corporation*, 2 FPC 380 (1941).

[36] On the other hand, Section 14(a) of the FPA provides that in administering the "net investment" concept detailed

therein, "the values allowed for water rights . . . [shall not] be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee . . ."

[37] If the Commission were to grant WWPC the present and ongoing right of occupancy under the FPA, requiring the payment of annual charges for that occupancy, such action could be construed as a taking of WWPC's property interest in the permitted lands without payment of just compensation.

[38] Without deciding whether the Spokane Indian Tribe is sufficiently "aggrieved" by this clarification of Opinion No. 117 to be entitled to apply for rehearing of this Opinion No. 117-A pursuant to Section 313(a) of the FPA, we will entertain an application for reconsideration of Opinion No. 117 if it is timely under Section 313(a) for rehearing of this Opinion No. 117-A, since the Tribe may have been misled by Opinion No. 117.

* * *

Butler, Chairman, dissenting:

The majority Opinion goes to extraordinary lengths to extend the Commission's jurisdiction over Little Falls Dam. This conclusion is nowhere better demonstrated than where the Opinion specifically takes official notice of an 1893 Report of the Chief of Engineers, U.S. Army. See majority Opinion, mimeo at

11-12, n.9. In doing so the Opinion has exceeded the proper limits of official notice.

Official notice is the administrative counterpart of judicial notice. The rationale for allowing a court or administrative tribunal the device offered by such notice is that it serves no purpose to require proof of obvious and notorious facts. *Judicial notice* is limited in scope. It extends only to facts within the knowledge of most men and facts which are capable of immediate and accurate demonstration by resort to easily accessible source of indisputable accuracy. "Hence judicial notice extends only to facts commonly known or which anyone may establish accurately by resort to a calendar, almanac, or the like." B. Schwartz, *Administrative Law* (1976) at 364-65. In contrast, *official notice* is broader in scope than judicial notice.

Under official notice, an agency may be permitted to notice facts which are only obvious and notorious to an *expert* in a given field. This approach allows an agency to also notice facts contained in reports, and records in its files. In *Wisconsin v. F.P.C.*, 201 F.2d 181 (D.C. Cir. 1952), the D.C. Circuit allowed official notice of reports filed with the FERC but did so apparently because they were filed by the regulated entity involved in the proceeding. *In re Hugoton-Anadarko Area Rate Case*, 466 F.2d 974 (9th Cir. 1972), the Ninth Circuit allowed the Commission to take official notice of an AGA report, but did so in that proceeding apparently because all parties had an opportunity to object to the report.

The information contained in the 90-year old report contains information which is not obvious and notorious to the

average man or to an expert in the given field. As juxtaposed with the *Wisconsin and Hugoton* decisions, the report is neither a document filed by a regulated entity involved in this or any other proceeding, nor did the parties to this proceeding have an opportunity to object to the report. Consequently, it should not be officially noticed and it should not be relied on by the Commission in this proceeding.

The Commission also appears to place substantial--and I believe undue--reliance on an 1892 report authorized by a Captain of the U.S. Army Corps of Engineers. Mimeo at 11-12 (Exhibit 159). Exhibit 159 is not information required by the Commission to be filed nor is it a report regularly kept on file and normally relied on by the Commission in the normal course of business. While the introduction into evidence of Exhibit 159 was not

objected to, it should be noted that it was introduced as the last of 159 exhibits introduced *en mass* and it was never referred to before the ALJ by either party again. It should be noted, however, that it was introduced into the record by The Washington Water Power Company to show that the river, at the time of the report, was not considered navigable, contrary to the proposition for which the majority cites it. Significantly, the affidavit attached to Exhibit 159 notes that, according to the Corps of Engineers in June 1978, the Spokane River was considered to be non-navigable prior to 1942. It is only through an overly selective reading of Exhibit 159 that the majority is able to glean support for its finding of jurisdiction.

Finally, if the instant project was constructed pursuant to a permit or existing right-of-way granted prior to

June 10, 1920, Section 23 of the Federal Power Act precludes the Commission from requiring Washington Water Power Company to apply for a license. In addressing this issue, the majority places undue emphasis on the legislative history of Section 2 of the Act of 1905, 33 Stat. 1006. See Opinion No. 117-A, mimeo at 16-17. Section 2 of the 1905 Act appears to empower the Secretary of the Interior to grant lands for the erection of suitable dams for the development of power. Section 2 specifically states that the Secretary is authorized to grant land ". . . as shall be necessary and requisite for overflow rights and for the erection of suitable water, electrical, or power plants, dams, wing walls, flumes, or other needful structures required for the development of power or for beneficial use of said water. . . ." The full text of § 2 is appended hereto. Given the plain meaning of the

words used, it is unnecessary to review the legislative history. See C.D. Sands, *2A Statutes and Statutory Construction* § 46.01 (4th ed. 1973). The majority fails to show why the plain meaning of § 2 is either patently or latently ambiguous, or why it must mean something other than what it clearly provides. Consequently, it is irrelevant that some legislative history appears to conflict with the plain meaning of the Act. Nevertheless, the majority disregards the plain meaning and, relying on a single floor statement by Representative Jones, incorrectly concludes that only Congress, not Interior, was empowered to authorize the construction of the instant project.[39]

Interior's interpretation of the scope of its authority under § 2 of the Act is significant and relevant to the present inquiry because Interior was charged with the administration of the

Act. The official record in this proceeding reveals without contradiction that Interior acted on the belief that it had the authority under § 2 of the Act to authorize the occupation of the waters of the Spokane River for the purpose of constructing a dam. On April 5, 1905, David Wilson, predecessor in interest to Washington Water Power Company (hereinafter "Wilson") petitioned the Secretary of the Interior for

> the right to attach any and all structures mentioned in [the Act of March 3, 1905] to the banks of the [Spokane River], and to permanently use and occupy so much of the said bank, together with necessary adjacent lands, to equip said power.
>
> * * *
>
> [and the] right to *occupy and improve said waters* of said river and the land incident thereto. . . .

Exhibit 5 at 2 (emphasis added); Exhibit 9 at 3. It is not only clear that Wilson was requesting authorization to *occupy* the

Spokane River, but that Interior was aware of and approved his request. On November 7, 1905, the Acting Commissioner of Indian Affairs wrote to the Secretary of the Interior and recommended that Wilson's application "be favorably considered." Exhibit 9 at 8. The November 7 letter expressly referred to Wilson's application to "occupy and improve said waters of said river. . . ." Exhibit 9 at 3. On November 11, 1905, the First Assistant Secretary of the Department of the Interior responded to the November 7 letter and approved the Acting Commissioner's recommendation. Significantly, the First Secretary's response likewise expressly referred to Wilson's application to occupy and improve the waters of said river. Exhibit 10 at 3. Having received the preliminary approvals, Wilson made his formal filing with the Department of the Interior where he specifically petitioned for the rights to

use the waters of the Spokane River for a dam (Exhibit 11 at 1) and ". . . *the right to erect and maintain any and all suitable dams*. . . ." (Exhibit 11 at 3) (emphasis added). The final approvals by the Department of the Interior thereafter followed. *See* Exhibits 16-17. The approvals in no way indicated that Congressional approval was a necessary step in the process. In fact there was only one express condition for Wilson to meet prior to construction: Wilson could not commence construction until compensation for lands taken and damages done had been determined and paid. Exhibit 17 at 3. Wilson thereafter applied for the inclusion of additional land and water rights, and such rights were subsequently granted to him by Interior. Exhibits 19-24. To disregard the numerous express references in the record concerning Wilson's requests to occupy the Spokane

River to build a dam, and Interior's specific approvals of those requests, would be to disregard Interior's interpretation of its authority under § 2 of the Act. Furthermore, there is judicial precedent supporting this conclusion. As admitted by the majority, dictum in *United States v. Big Bend Transit Co.*, 42 F. Supp. 459 (E.D. Wash. 1942) indicates that Interior had this authority. The majority, however, simply does "not agree" with the *Big Bend* decision. Opinion No. 117-A, mimeo at 18-19.

Given the plain meaning of § 2 of the Act and Interior's interpretation of § 2, and the dictum in *Big Bend, supra*, it is more reasonable than not to conclude that Interior had the authority to authorize Wilson to occupy the Spokane River; it was not necessary for Wilson to obtain supplemental authority from Congress. Therefore, pursuant to Section 23 of the

Federal Power Act, I would not require Washington Water Power Company to apply for a license.

-Footnote-

[1] The majority asserts instead that Interior's authority under § 2 was limited: Interior had the authority to allow the *use* of water for power purposes but did not have the authority to allow the *occupation* of water for power purposes by dam. *See* Opinion No. 117-A, mimeo at 1.

WASHINGTON WATER POWER CO. v. F.E.R.C.

775 F.2d 305 (D.C. Cir. 1985)

WASHINGTON WATER POWER COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

Spokane Tribe of Indians, Intervenor.

No. 83-2051.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 11, 1984.

Decided Oct. 18, 1985.

Petition for Review of an Order of the Federal Energy Regulatory Commission.

Jerry K. Boyd, Spokane, Wash., with whom Peyton G. Bowman, III and Edward M. Leigh, Washington, D.C., were on brief, for petitioner.

Joel M. Cockrell, Atty., F.E.R.C., Washington, D.C., with whom Jerome M. Feit, Sol., and Joshua Z. Rokach, Atty., F.E.R.C., Washington, D.C., were on brief, for respondent.

Robert D. Dellwo, Spokane, Wash., with whom Gary T. Farrell, Spokane, Wash., was on brief, for intervenor Spokane Tribe of Indians.

Before TAMM* and MIKVA, Circuit Judges, and MacKINNON, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge MacKINNON.

Dissenting opinion filed by Circuit Judge MIKVA.

MacKINNON, Senior Circuit Judge:

Two orders of the Federal Energy Regulatory Commission ("FERC" or the "Commission") hold that the Washington Water Power Company ("Washington Power" or the "Company") is required by the Federal Power Act, 16 U.S.C. § 791 *et seq.* ("FPA"), to obtain a license for its hydroelectric development which was completed in 1911 on the Spokane River at Little Falls, Washington. Washington Power

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* Judge Tamm had fully concurred in this opinion prior to his death.

claims it constructed, operates, and maintains the dam and associated structures under the authority of a special Act of Congress approved on March 3, 1905 (the "1905 Act"), and that the Little Falls dam therefore falls within the specific exceptions contained in sections 23(a) and 23(b) of the Federal Power Act.

The Commission contends for a different construction of the 1905 Act. It asserts that the 1905 Act did not authorize the construction of a dam, but only granted to the Company certain land and water rights ancillary to the actual construction of a dam and the occupation of the Spokane River. In addition, the Commission contends that in any case the Department of Interior's approvals under the 1905 Act of the application by the predecessor of the Company, and of the application of the Company itself, were

insufficient to grant the Company the right to construct and operate the dam and the accompanying hydroelectric project, since the 1905 Act allegedly did not authorize the granting of the right to build a dam, but only the use of water and land. To occupy the Spokane River, which the Commission now claims was a navigable waterway of the United States, Washington Power allegedly should have secured permission from Congress and complied with the other requirements of sections 9 and 10 of the Rivers and Harbors Appropriation Act of 1899. 30 Stat. 1151 (1899) (codified as amended at 33 U.S.C. §§ 401 and 403 (1982)) (hereinafter cited as the Rivers and Harbors Act). The Commission held that having failed to do this, Washington Power did not have a complete "permit or right of way" prior to June 10, 1920 to construct or to operate the dam, and therefore the dam does not fall under

the exceptions set out in sections 23(a) and 23(b) of the Federal Power Act. However, the 1905 Act incorporates by reference the water law of the State of Washington and provides that applicants for rights of way shall acquire water rights "by appropriation under and pursuant to *the laws of the State of Washington*." This vital provision, which is basic to a proper interpretation of the 1905 Act, is totally ignored by the brief of the Commission. The agency gives absolutely no consideration to this important, if not controlling, provision of the Act. This failure is fatal to the Commission's attempted construction of the Act.

We hold that the Spokane River in 1905-10 was not a navigable waterway of the United States and that the Secretary of the Interior was authorized by the 1905 Act, which incorporated Washington water

law by reference, to consent to and grant qualified applicants valid rights of way to construct dams on and to occupy the Spokane River at Little Falls, and to authorize the construction of the Little Falls development. Washington Power's Little Falls development therefore comes within the statutory exceptions set forth in sections 23(a) and 23(b) of the Federal Power Act, and the Company is *not* required, now that the River below Little Falls has become navigable, to obtain a license to continue to operate and maintain the development at Little Falls.

I. BACKGROUND

Around 1905, David Wilson, a private entrepreneur responsible for much of the development of western Washington State, owned land on the south bank of the Spokane River at Little Falls, about 45 miles downstream from Spokane, Washington (J.A. 637-42). Wilson wanted to use the 83

foot drop in the river at that point (J.A. 637) to produce electricity and to do so needed to obtain an interest in the land on the north bank and in the bed and waters of the river itself. However, the north bank of the river and all land up to the high water mark on the south bank was within the Spokane Indian Reservation (the "Reservation"). Wilson could have obtained a permit from the Secretary of the Interior to use a right of way through the Reservation for a dam, etc., under the Act of February 15, 1901, 31 Stat. 790,[1] which

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[1] In addition to the powers granted by the Act of Mar. 3, 1905, the Secretary of the Interior also had the additional power granted by the Act of February 15, 1901, relating to rights of way through reservations, etc.

This Act provided:

> That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the ...

(continued...)

applied generally to public lands and

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[1](...continued)

> reservations of the United States ... for electrical plants, poles, and lines for the generation and distribution of electrical power ... and for canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits, and for ... *dams*, and reservoirs used to promote [certain commercial activities] or any other beneficial uses to the extent of the ground occupied by ... electrical or other works permitted hereunder, ... by any citizen, association or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said ... Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such ... reservation falls and upon a finding by him that the same is not incompatible with the public interest ... *And provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or by his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any ... reservation....*

31 Stat. 790 (1901) (emphasis added).

reservations. Such permit, however, would have been revocable at the discretion of the Secretary. *Id.* Moreover, it would not have included the right to the *use* of the river's water. *Id.* Unwilling to invest in building a power dam under these circumstances, Wilson enlisted the help of Representative Jones of Washington, the Congressman for the district, to sponsor a bill, which was enacted, "[p]roviding for the acquirement of water rights ... [and] land ... for sites for power purposes and the beneficial use of said water, and for other purposes." 33 Stat. 1006 (1905).[2]

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[2] The 1905 Act provides:

> *An Act Providing for the acquirement of water rights in the Spokane River along the southern boundary of the Spokane Indian Reservation, in the State of Washington, for the acquirement of lands on said reservation for sites for power purposes and the beneficial use of said water, and for other purposes.*

(continued...)

[2](...continued)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right to the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation may, with the consent of the Secretary of the Interior, be acquired by any citizen, association, or corporation of the United States by appropriation under and pursuant to the laws of the State of Washington.

Sec. 2. That the Secretary of the Interior be, and he hereby is, authorized and empowered to grant such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indians, but which has not been conveyed to the allottee with full power of alienation, or whether the same remains unallotted, on the north bank of the said Spokane River, such as shall be necessary and requisite for overflow rights and for the *erection* of suitable water, electrical, or power plants, *dams,* wing walls, flumes, or other needful structures required for the development of power or for the beneficial use of said water: *Provided,* That no lands shall be granted under this Act until after the Secretary of the Interior is satisfied that the person, association, or company applying has

(continued...)

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[2](...continued)

made said application in good faith and *with intent and ability to use said lands for the purposes above specified* and that it requires the quantity of lands applied for in such use, and in case objection to the grant of said land shall be made, the said Secretary shall afford the parties so objecting a full opportunity to be heard.

Sec. 3. That the compensation to be paid for said land by said applicants shall be determined in manner prescribed in Section Three of the Act of March second, eighteen hundred and ninety nine, entitled "An Act to provide for the acquiring of rights of way by railroad companies through Indian Reservations, Indian lands, and Indian allotments, and for other purposes."

Sec. 4. That if the land allotted in severalty to any individual Indian which has not been conveyed to the allottee with full power of alienation be granted to any such appropriator, the Secretary of the Interior is empowered to use the moneys received for such land so allotted in the purchase of other suitable lands for such allottee.

Sec. 5. That the Secretary of the Interior shall make all needful rules and regulations not inconsistent herewith for the proper execution and carrying into effect of this Act.

(continued...)

This bill applied only to the Spokane River along the southern boundary of the Spokane Indian Reservation and became the 1905 Act. It empowered the Secretary of the Interior to "*consent*" to citizens, associations and corporations of the United States acquiring "the use of the waters of the Spokane River" along the southern boundary of the Spokane Indian Reservation. The "right" to the use of this water was to be acquired, under the procedure provided for by the Act, by "*appropriation* under and pursuant to the laws of the State of Washington." It also empowered the Secretary of Interior to grant such appropriators "land" within the Reservation "for the erection of suitable water, electrical, or power plants, *dams*

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[2](...continued)

Pub.L. No. 173 ch. 1440, 33 Stat. 1006 (1905) (emphasis added).

... and other needful structures required for the development of power or for the beneficial use of said water." *Id.* § 2 (emphasis added).

Immediately after Congress passed the 1905 Act, Wilson took the initial step to appropriate a flow of 10,000 cubic feet per second at Little Falls pursuant to and in accordance with the laws of Washington, and applied under the 1905 Act to the Secretary of Interior to acquire the right to use the waters of the Spokane River at the point of appropriation and to purchase 100 acres of the Reservation on the north bank of the river. The Secretary of the Interior, on November 3, 1906, acting in accordance with the 1905 Act, granted the 100 acres and the right to use the waters by approving Wilson's application (J.A. 261-81). This approval constituted the "1906 permit."

Less than a year later, on July 8, 1907, Wilson sold his interests in the lands and water rights to Washington Power (J.A. 298-322). In 1908, the Company began construction of the hydroelectric development.

The dam was constructed by the Company without complying with sections 9 and 10 of the Rivers and Harbors Act, 33 U.S.C. §§ 401 and 403, as would have been required if the Spokane River at that time and place was a "navigable river ... of the United States ... or ... navigable ... wholly within [Washington]."[3] Washington

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[3] The Rivers and Harbors Appropriation Act at the relevant time provided:

> Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, *navigable river, or other navigable water of the United States* until the consent of Congress to the building of such structures shall have been

(continued...)

Power also developed the Little Falls plant on the opposite side of the river from the site originally contemplated by Wilson, and so used some lands of the

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[3](...continued)

obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie *wholly within the limits of a single State*, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

30 Stat. 1151 (emphasis added). As set forth below, we find that the Spokane River was not "navigable" within Washington.

Reservation that were not included in the interests assigned to the Company by Wilson. Thus Washington Power itself appropriated a flow of 10,000 cubic feet per second pursuant to the laws of the State of Washington.

On May 18, 1908, Washington Power applied under the 1905 Act to the Secretary of the Interior to acquire the right to use the waters of the Spokane River at the point of its appropriation and to purchase an additional eight acres of Reservation lands at the same point (J.A. 328-409). On August 29, 1908, an Assistant Secretary of the Interior endorsed the initial approval of this acquisition by the Commissioner of Indian Affairs (J.A. 435). This constituted the "1908 permit." The original Wilson grant was also resurveyed by Captain Webster, United States Army, and others (J.A. 531-32), and approved by the Secretary of

the Interior on May 6, 1910. The dam began producing electric power the same year.

The issue in this case is whether the present Commission correctly held, given the foregoing facts, that the present Federal Power Act, as enacted in 1920 and amended in 1935, requires Washington Power now to apply for and obtain a license in order to continue to operate and maintain the 1911 Little Falls hydroelectric development. We hold that under the exceptions contained in sections 23(a) and 23(b) of the Act, Washington Power is not required to apply for or to have any additional license or authority to continue to operate and maintain the existing Little Falls plant.

II. THE STATUTORY FRAMEWORK AND THE LAW OF APPROPRIATION IN WASHINGTON

Sections 23(a) and 23(b) of the Federal Power Act, 16 U.S.C. §§ 816 and 817, provide:

> Sec. 23(a) *The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way heretofore granted* or as confirming or otherwise affecting any claim, or as *affecting any authority* heretofore given pursuant to law ...

(41 Stat. 1075, 49 Stat. 846). Cf. 16 U.S.C. § 816 (emphasis added).

> (b) It shall be unlawful for any person, state, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the *navigable waters of the United States,* or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, *except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920,* or a license granted pursuant to this Act....

16 U.S.C. § 817 (41 Stat. 1075, 49 Stat. 896) (emphasis added). The first question

that must be addressed, is whether Washington Power prior to June 10, 1920, possessed a "valid existing right-of-way" to "operate, or maintain [a] dam" at Little Falls on the Spokane River. Since the critical language of the exception is in the disjunctive, it is not necessary to determine in addition whether the Secretary's action also constituted a "*permit*" to "construct [a] ... dam" (emphasis added).

[1] It is clear from the language of the 1905 Act and from the contemporary laws of the State of Washington, which Congress incorporated by reference, that Washington Power had acquired a "valid existing right-of-way" to construct, operate, and maintain the Little Falls dam by the time it began producing electricity in 1910.

The 1905 Act provides:

> That the right to the use of the waters of the Spokane River where the said River forms the southern boundary of the Spokane Indian Reservation may, with the consent of the Secretary of the Interior, be acquired by any citizen, association, or corporation of the United States *by appropriation under and pursuant to the laws of the State of Washington.*

Section 1, 33 Stat. 1006 (emphasis added). The 1905 Act sets out unambiguously Congress' intention as to the manner of acquiring the right to the use of these waters: *"by appropriation under and pursuant to the laws of the State of Washington." Id.* The 1905 Act thus incorporates by reference the state law of Washington as to the appropriation of water and makes it the congressionally mandated federal law governing the portion of the Spokane River bordering on the Spokane Indian Reservation. This was a

completely sensible course for Congress to take.

Appropriation is a fundamental doctrine of water law in the western states. This doctrine developed in California in the first decade after the American conquest. Congress had failed to prescribe any legislative rules to govern water use on the public lands of these new federal territories, so miners without title based their use of water on the simple but effective doctrine of first come, first served. The common law of England, based on ownership of land and riparian use of streams, based on ownership of land and riparian use of streams [sic], was generally ignored and another common law grew out of the customs and usages of the early American west, inspired principally by the paramount interest in mining precious minerals. The doctrine of appropriation, however, did

not govern the water rights of Indian tribes and pueblos under federal law or the proprietary rights of the federal government. *See generally* 1 W. Hutchins, *Water Rights in the Nineteen Western States* 13-20 (1971). When Wilson wanted to appropriate the flow of the Spokane River by building a dam across it, therefore, the rights of the Spokane Indians and the federal government stood in the way.

This case thus becomes clearer if we first consider how Wilson would lawfully have proceeded under the laws of Washington, as Congress directed, had he chosen to appropriate water from a nonnavigable river on public land not within a federal Indian reservation. The procedure for appropriating water in effect in Washington when the 1905 Act was passed was established by the Act of 1891, passed by the Washington State Legislature in its second year of existence. 1891

Wash.Laws c. 142. The Act of 1891 provided that the right to the use of the water of streams, lakes, and certain other named surface sources for irrigation, mining, manufacturing, domestic, or municipal purposes could be acquired by appropriation. The 1891 procedure remained in effect until 1917, when another statute superseded it. While the 1891 Act did not provide specifically for appropriation for the production of electric power, the Washington Supreme Court ruled in 1908 that the statute did not provide the exclusive means of exercising the appropriative right. Rather, water rights could be appropriated in the customary way, the statute only providing one means to prove and preserve the right. *Kendall v. Joyce,* 48 Wash. 489, 93 P. 1091 (1908).

The Washington Supreme Court, in one of its earliest water rights decisions, had already announced, moreover, the

essentials of a valid appropriation of water. Appropriation, the court stated, comprises the intent to take water, accompanied by some open, physical demonstration thereof, for some valuable use, followed up with reasonable diligence and consummated without unnecessary delay. *Ellis v. Pomeroy Improvement Co.*, 1 Wash. 572, 21 P. 27 (1889). Construction of a dam for hydroelectricity unquestionably may satisfy these requirements for a valid appropriation. Thus if Wilson had built his dam and power plant on a nonnavigable stream flowing through public land in Washington, *not on a federal reservation,* he would have, leaving the rest of the facts of this case unchanged, acquired a valid interest in the waters of that stream through appropriation under Washington law. This legal system was well-established by 1905 and it is

explicitly this body of law to which the 1905 Act referred.[4]

The existence of the *Spokane Indian Reservation* through whose lands flowed the Spokane River at Little Falls, however, obviously complicated the task of the would-be appropriator. In 1899, the United States Supreme Court ruled in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702, 19 S.Ct. 770, 774, 43 L.Ed. 1136 (1899), that the federal government could reserve the use of water originating on or flowing through land owned by the federal government from

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[4] The subsequent Water Code of 1917 recognized "the existing rights of any riparian owner, [and] any existing right acquired by appropriation or otherwise." Laws of Washington 1917, ch. 117 § 1. Also, that "the use of water which has been applied to a beneficial use would be and remain appurtenant to the land or place upon which the same is used." *Id.* § 39.

appropriation under state law.[5] This rule was affirmed in *United States v. Winans,* 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), and in 1908, the landmark case of *Winters v. United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), followed this line of authority, and dealt specifically with the reservation against appropriation of water of a nonnavigable stream bordering the Fort Belknap Indian Reservation in Montana. In 1905, therefore, any appropriation at Little Falls under Washington state law would risk being trumped by the superior rights under the doctrine applicable to federal reservations. Any right arising from an attempt to appropriate water *solely* under Washington law from a stream flowing

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[5] Since the Spokane Indian Reservation extended to the high water mark on the south bank of the River, the Tribe owned the river bed and the River flowed through the Reservation.

through a federal Indian reservation would have been precarious indeed.

Neither did statutory law provide much leeway to appropriators of water on Indian reservations. In the Act of February 15, 1901, 31 Stat. 790, previously referred to (see n. 1), Congress permitted the development of hydro-electric power on Federal reservations by authorizing the Secretary of Interior to permit the use of rights of way through public lands, forests, and other reservations of the United States, including Indian reservations, for electrical plants, poles, and lines for generation and distribution of electric power, as well as for "dams" used for any beneficial purpose. The 1901 Act, however, provided that any permission given by the Secretary of the Interior (the "Secretary") under the 1901 Act "may be revoked by [the Secretary] in his

discretion, and shall not be held to confer any right or easement, or interest in, to, or over any public land, reservation, or park." *Id.*

The 1905 Act, however, is a *special act* that granted greater and different rights than the 1901 Act. That was its purpose. It specifically authorizes the Secretary to grant land on the Reservation to appropriators of water *under the laws of Washington* for the "erection of electrical, or power plants, dams for the development of power or for the beneficial use of said water," 1905 Act, § 2, without conferring on the Secretary any right to revoke the right of way at will. The 1905 Act further adopts, *mutatis mutandis,* for the purposes of determining compensation, the Act of March 2, 1899, pertaining to "*rights-of-way* by railroad companies through Indian Reservations." 30 Stat. 990 (emphasis added).

[2] The special Act of the 1905 Congress thus served several purposes. By providing that rights in the waters of the Spokane River bordering the Reservation could be acquired, with the consent of the Secretary, in accordance with the laws of the State of Washington, it cleared away any obstacle for hydroelectric development that may have existed under the federal reservation doctrine, which as we have seen, potentially conflicted with the state appropriation law. It provided, moreover, a means to compensate residents of the Reservation for any damage done to their property by the construction of dams and other works. And finally, it increased the incentive and ability to develop the water power of the Spokane River by obviating the Secretary's discretion to revoke at will hydroelectric rights of way that might be granted to that river along the southern boundary of the Reservation.

Thus Congress clearly intended by the special Act to establish the framework by which hydroelectric developers could acquire the land on the banks, and the right to the use of the waters and the bed of the Spokane River to produce electricity.

This interpretation is confirmed by the language of the Act itself, its legislative history, and related statutory law. In the 1905 Act Congress authorized the Secretary of the Interior

> to grant ... land on [the Spokane Indian Reservation] ... such as shall be necessary and requisite ... for the erection of suitable ... electrical, or power plants, [and] dams ... required for the development of power or for the beneficial use of said water [upon showing to the satisfaction of the Secretary of Interior that the applicant had the] ... intent and ability to use said lands for the purposes above specified....

Act of Mar. 3, 1905, 33 Stat. 1006, § 2. The language of the Act clearly contemplates the grant of land by the Secretary for the specific purpose of constructing a dam, a reservoir and other works. The grant for that purpose implicitly confers on an approved applicant the right "to use said lands for [said] purpose"—otherwise the grant would be sterile and no federal law at that time prohibited such use. These grants constitute "rights-of-way" for the "erection of suitable ... electrical ... plants, dams, [etc.]" The Act also recognizes that the necessary water rights are to be "acquired ... by appropriation under the laws of Washington," provided that the applicant made the additional showing that he was able and intended "to use said lands for the [specified] purposes." Act of 1905, 33 Stat. 1006, § 2. All of this flows from the Act to be

administered by the Secretary of the Interior.

Section 3 of the Act, moreover, clearly indicates that Congress intended the Act to authorize the granting of rights of way. That section provides that "the compensation to be paid for said land ... shall be determined in the manner prescribed ... in the Act of [March 2, 1899, which provided] ... for the acquiring of *rights-of-way* by railroad companies through Indian reservations...." *Id.* § 3 (emphasis added). The Act of March 2, 1899 (30 Stat. 990) provided for railroad companies to acquire "rights-of-way" for the purpose of constructing railroads through Indian reservation lands and for the payment of compensation for damage caused by the "construction" of railroads. 30 Stat. at 990-92. It would be mysterious indeed if Congress relied on a statute that provided

compensation for damages caused by the "construction" of railroads as the model for a statute which, under FERC's attempted construction, did *not* authorize the "construction" of dams.[6] For if Congress did not intend dams and other works to be constructed on the "rights-of-way" it provided for, there is no explanation for its including a specific provision for the payment of compensation for damages caused by construction. What other construction would there be? No compensatory damage would result merely from the acquisition of unused rights of way and water rights.

The correct reading of the 1905 Act, of course, avoids this enigmatic and

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[6] The 1905 Act also parallels the 1899 Act in that both permit the Secretary of Interior to authorize construction on Indian reservations only after the Secretary has ascertained that the applicant has the resources necessary to carry through with the project, a statutory requirement that would make no sense under FERC's interpretation.

unreasonable construction. Congress intended to provide for the granting of rights of way for the construction of dams and the statutory means to compensate parties for any damage done to them by such construction, just as Congress had provided for with respect to the construction of railroads. To construe the 1905 Act now, eighty years later, as not authorizing the construction of the dam, which was the single purpose Congress passed the Act and for which the Secretary granted the land and consented to the acquisition and use of the necessary water rights in the first place, would frustrate the clear intent of Congress expressed in the 1905 Act and the sole reason for its enactment. The erection of a dam or dams for hydroelectric development was the express purpose for which grants of rights of way were authorized by the 1905 Act, and Wilson and Washington Power both

expressly requested authorization to exercise the right to construct a dam. *See infra* at 320-21. Indeed, as noted above, section 2 of the Act *required* an applicant to demonstrate the "intent and ability" to erect the necessary structures required for the development of power or for the beneficial use of the water before he could be granted or acquire any land or water rights.

A. The Legislative History

[3] The FERC rejects this appeallingly straightforward interpretation of the statute and contends instead that the intent of Congress cannot be interpreted as authorizing the actual building of a dam. The Commission's only plausible support for this view is the colloquy on the House floor, set forth in

the margin,[7] between Representative Jones

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[7] Water Rights in Spokane River.

Mr. JONES of Washington. Mr. Speaker, I ask unanimous consent for the present consideration of the bill (H.R. 15609) providing for the acquirement of water rights in the Spokane River along the southern boundary of the Spokane Indian Reservation, in the State of Washington, for the acquirement of lands on said reservation for sites for power purposes and the beneficial use of said water, and for other purposes, which I send to the desk and ask to have read.

The Clerk read as follows:

Be it enacted, etc., That the right to the use of the waters of the Spokane River where the said river forms the southern boundary of the Spokane Indian Reservation may be acquired by any citizen, association, or corporation of the United States by appropriation under and pursuant to the laws of the State of Washington.

Sec. 2. That the Secretary of the Interior be, and he hereby is, authorized and empowered to grant such appropriator or appropriators land on said reservation, whether the same has been allotted in severalty to any individual Indians, but which has not been conveyed to the allottee with full power of alienation, or whether the same

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[7](...continued)

remains unallotted, on the north bank of the said Spokane River, such as shall be necessary and requisite for overflow rights and for the erection of suitable water, electrical, or power plants, dams, wing walls, flumes or other needful structures required for the development of power or for the beneficial use of said water: *Provided*, That no land shall be granted under this act until after the Secretary of the Interior is satisfied that the person, association, or company applying has made said application in good faith and with intent and ability to use said lands for the purposes above specified and that it requires the quantity of land applied for in such use, and in case objection to the grant of said land shall be made the said Secretary shall afford the parties so objecting a full opportunity to be heard.

Sec. 3. That the compensation to be paid for said land by said applicants shall be determined in the manner prescribed in section 3 of the act of March 2, 1899, entitled "An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes."

Sec. 4. That the Secretary of the Interior shall make all needful rules and regulations not inconsistent herewith for the

(continued...)

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[7](...continued)

proper execution and carrying into effect of this act.

The SPEAKER. Is there objection?

Mr. DALZELL. Mr. Speaker, reserving the right to object, I would like to have some explanation of this bill.

Mr. JONES of Washington. Mr. Speaker, the Spokane River forms the southern boundary of the Spokane Indian Reservation for a considerable extent. There is quite a fall in the river. There are considerable rapids there which would furnish splendid water-power facilities to the land on the north side. Being an Indian reservation there is no way by which sites for power purposes could be acquired. Our supreme court also has held that the riparian doctrine with reference to water holds in our State, and the question of the acquirement of water rights on the reservation is a matter of some doubt. This bill simply authorizes the acquirement of water rights on the reservation side of the river under the laws of the State of Washington, and the committee has put in a further restriction that it must be with the consent of the Secretary of the Interior. In order to secure sites for water-power purposes there is no law now under which the title to these sites can be secured. There is a law enabling companies to secure permits or

(continued...)

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[7](...continued)

licenses; but of course they would not want to expend large sums of money on a mere license or permit, so this bill authorizes the acquirement of title to this land under the procedure of law by which railroads can acquire rights of way through reservations. The money is to be paid to the Treasury for the benefit of the Indians, and the amendment suggested by the committee is that if any allotment is taken the sum received can be used by the Secretary of the Interior in the purchase of other suitable land for such allottee.

Mr. DALZELL. How is the water power to be used, by dams in the river?

Mr. JONES of Washington. They will probably dam the river. This is a matter they are willing to take care of at some future time. I will say, however, that the War Department had the matter investigated, and I know from personal observation that that part of the river is *not navigable*. This is simply a matter in reference to Indian lands, however, and the acquirement of water rights.

Mr. DALZELL. From what committee is this bill reported?

Mr. JONES of Washington. From the Committee on Indian Affairs. It simply affects Indian lands and provides means by which persons can acquire permanent rights.

(continued...)

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[7](...continued)

Mr. LOVERING. Does it carry the right to dam the river?

Mr. JONES of Washington. Oh, no; not at all. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.

The SPEAKER. Is there objection? [After a pause.] The Chair hears none.

Mr. JONES of Washington. Now, Mr. Speaker, in the amendment as section 4 the word "appropriation" should be "appropriator," and I will move the amendment.

The SPEAKER. The Clerk will report the amendment. The Clerk read as follows: Amend the amendment as section 4 by striking out the word "appropriation" and insert the word "appropriator."

Mr. STEPHENS of Texas. Do you accept the committee amendment?

Mr. JONES of Washington. Yes. The question was taken on the amendment to the amendment, and it was agreed to.

The SPEAKER. The question now is on agreeing to the committee amendment. The question was taken, and the amendment was agreed to.

The bill as amended was ordered to the engrossed and read a third time; and was read

(continued...)

of Washington, the author of the bill (H.R. 15609), and Representatives Dalzell and Lovering on February 11, 1905, the day the House passed the bill. The Act itself is sufficiently clear on its face so as not to require or authorize recourse to legislative history. *United States v. Oregon,* 366 U.S. 643, 648, 81 S.Ct. 1278, 1280, 6 L.Ed.2d 575 (1961); *Aviation Consumer Action Project v. Washburn,* 535 F.2d 101, 106 (D.C.Cir.1976). However, even the legislative history undergirds the view that the Act contemplated the construction of a dam, as careful examination of the colloquy between Congressmen Jones and Dalzell and Lovering reveals.

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[7](...continued)
the third time, and passed.

On motion of Mr. JONES of Washington, a motion to reconsider the last vote was laid on the table.

39 Cong.Rec. 2413 (1905) (emphasis added).

In this colloquy, Mr. Dalzell first inquired "How is the water power to be used, by dams in the river?" Mr. Jones of Washington replied:

> They *will probably dam the river*. This is a matter they are willing to take care of at some future Time. I will say, however, that the War Department had the matter investigated, and I know from personal observation that that part of the river is *not navigable*. This is simply a matter in reference to Indian lands, however, and the acquirement of water rights.

39 Cong.Rec. 2413 (1905) (emphasis added). From the foregoing exchange, it is clear that Jones plainly told Congress that erecting a "dam [in] the river" was more than a possibility, it was a *probability* that "they [Wilson and later the company] are willing to take care of at some future time." In making this representation to Congress, Representative Jones gave the House (and us) the underlying explanation why the Bill took the form it did. He

stated categorically that "the War Department had the matter [navigability] investigated and [Rep. Jones] knew from personal observation that that part of the [Spokane] river is *not* navigable" (emphasis added). Had the river been navigable, the consent of the Secretary of Interior would probably not have been sufficient since the Rivers and Harbors Appropriation Act of 1899 required the consent of Congress and the Army Corps of Engineers before a party could lawfully obstruct a *navigable* stream with a dam. Since the river was not navigable, however, as we discuss below, the consent of Congress and other requirements of the Rivers and Harbors Act were not applicable.

Representative Jones then stated to Congress that the bill "simply affects Indian lands and provides means by which persons can acquire the *permanent rights*."

See note 7 *supra* (emphasis added). This expression of congressional intent indicates that the interests in the lands that would be granted by the Secretary of the Interior to erect dams, acquire water rights, etc., pursuant to this special Act of March 3, 1905, would be "permanent" rights so long as they were used for the purposes Congress empowered the Secretary to approve. The Reservation lands ran to the high water mark on the south side of the River and thus the grant included the river bed sufficient to erect the needed dam, since the applicants already owned the contiguous land on the south bank necessary for the dam.

The colloquy then continued to the point where Jones made the remark upon which the Commission relies so heavily:

> Mr. Lovering. Does [the bill] carry the right to dam the river?

> Mr. Jones of Washington. Oh, no; not at all. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.

Id. The FERC contends this exchange demonstrates that "the 1905 Act dealt with the granting of water and land rights, not the authority to build a dam." Brief of FERC at 16. This position ultimately leads the FERC to conclude that Washington Power was without authority to erect the dam in 1908-10 and that it has operated the dam for over 70 years without valid authority. This construction of Congressman Jones' remark is, however, too broad. It ignores the earlier statement by the bill's author that "[t]hey will probably dam the river." It also ignores the plain language of the Act. The reconciliation of these two statements, that "they will probably dam the River" and that the bill does not

carry the right to dam the river is in fact, however, not difficult.

We may begin with the unambiguous statement that Wilson and company *"will probably dam the river"* and that "they are willing to take care of [that matter] at some future time." Congressman Jones obviously took the inquiry of Congressman Lovering to be an inquiry directed to Committee jurisdiction. His reply to the inquiry whether "the bill [carried] the right to dam the river," was directed to whether the terms of the bill required it to be considered by the Committee on Interstate and Foreign Commerce which had jurisdiction over legislation involving *navigable* waters of the United States. Thus Congressman Jones' reply was indicating that the bill authorized "the acquirement of water rights" for which "[t]hey will probably dam the river," and that they could do this because "that part

of the river is not navigable." However, if in the future the "matter [of building a dam in navigable waters] came up [it] would have to go to the Committee on Interstate and Foreign Commerce." This interpretation reconciles both Congressman Jones' remarks and explains his reply in terms related to the jurisdiction of the Committee on Interstate and Foreign Commerce. Congressman Lovering of Massachusetts, the second member who inquired concerning the right to dam the river, was one of the more senior members of that Committee. 1905 *Congressional Directory* 182.

Congressman Dalzell, who questioned Congressman Jones as to whether the river would be dammed and from what committee the bill was reported, was a member of the Rules Committee. He was undoubtedly concerned with whether the bill was proper for consideration on the unanimous consent

calendar as well as whether the House committee with appropriate jurisdiction over the damming of navigable rivers had reported the bill. The bill had been reported out by the Committee on Indian Affairs and was being considered on the unanimous consent calendar. If the river was navigable, the Committee on Interstate and Foreign Commerce would have had jurisdiction; then Congressmen Dalzell and Lovering would have realized the bill had not come from the correct committee, and either could have stopped it by a single objection.

There was, moreover, a chance that in the future the "matter" of damming a navigable river would come up, since at the time the bill was being considered, an officer of the Army Corps of Engineers was conducting a navigability study of the river (J.A. 623). While Congressman Jones was confident from personal observation,

and his stated knowledge of the War Department investigation (39 Cong.Rec. 3413), that the river was not navigable, if the study determined it was, the Committee of Interstate and Foreign Commerce would have had to approve legislation authorizing obstruction of the stream. The river was not navigable, however, and the matter did not come up.

The House therefore passed the bill on Congressman Jones' representation, based on the War Department's investigation and his personal observation, that the river was not navigable. The bill was passed by the House on February 11, 1905, 39 Cong.Rec. 2713, and 20 days later on March 2, 1905 by the Senate. 39 Cong.Rec. 3847. There was ample time after the House passed the bill and before the Senate passed it for the War Department to intervene and correct any inaccurate assessment of the

River's navigability. The fact that neither the War Department nor any other party attempted to stop this bill by claiming the river was in fact navigable, is strong evidence that no one in authority doubted that the river was *not* navigable. Since the bill passed both houses on the unanimous consent calendar, a single objection could have stopped the bill. *Id*. It should also be noted that the Army engineer advised, subsequently by letter of March 20, 1905 to the Army District Engineer at Portland, Oregon, that "the Spokane River is only navigable to Post Falls" (J.A. 623). Had the Army found the River to be navigable it could easily have stopped the Little Falls Development. The evidentiary record, however, demonstrates that the Army Engineers were cognizant of the development being implemented by the 1905 Act, they investigated the matter and saw

no basis for the exercise of their jurisdiction over any "navigable" water. *Id.*

[4][5] Congressman Jones was, in addition, correct in stating that the bill did not give any particular person the right to dam the river. The bill did not carry the *complete* right to dam the river, although the Act went as far in that direction as it could with respect to a river that was not a navigable river of the United States, unless Congress wanted to make established Washington water law inapplicable. Complete authority to dam the river, under the 1905 Act, was to be derived from satisfying the requirements of *both* federal and state law under the terms of the 1905 Act. Congress could grant the *land* including the stream bed upon which to erect the dam, but that was only part of the authority that was needed. It was still necessary under the

Act for the Secretary to consent and for the appropriator to obtain the right to use the waters of the Spokane River "*by appropriation* under and pursuant to the laws of the State of Washington" (emphasis added). Under the Washington statute, appropriation of water rights was not limited to any particular method. 1891 Wash.Laws ch. 142, § 1. Therefore it was permissible, in the absence of any controlling prohibition, to appropriate water by diversion, as Wilson intended, to be accomplished by a dam. His application to the Secretary of the Interior stated that the diverted water would be used, *inter alia,* for a power house, lighting plant and irrigation system (J.A. 267-68). Obviously any diversionary method would satisfy the statute. Thus the laws of Washington in effect in 1908-10, authorized *any* citizen or corporation of the United States that desired to

appropriate unappropriated water in a *non-navigable* stream to do so by the erection of a dam, provided he had the necessary consent and rights in the river bed and in any land that might be overflowed. *Griffith v. Holman,* 23 Wash. 347, 63 P. 239, 243 (1900) (the riparian owner has the right to obstruct a *non-navigable* river). Therefore, when the Secretary made the grant of the right of way in the land, and consented to the acquisition of the right to use the water by the erection of the dam, he authorized the construction of the dam in accordance with the intendment of the Act. No federal or state statute or decisional law, at that time, required a more specific "permit" to build a dam to divert nonnavigable waters under such factual circumstances. The principal objective obstacle here for Wilson was to acquire a sufficient right of way interest in the

land constituting the river bed, and the appurtenant riparian and other rights of the Spokane Indian Tribe and the United States, to erect a dam. The 1905 Act provided for the attainment of all such objectives by authorizing the Secretary to "consent" to the acquisition of water rights by Wilson and Washington Power and to "grant" them, as appropriators, the necessary rights of way.

Thus, when Representative Jones replied to Representative Lovering's inquiry as to their "right to dam the river" that "[t]hey have to take their chances on that," he was in fact giving a plain description of the legal procedure that the applicants had to go through to secure their complete right to dam the river under the terms of the 1905 Act. Not only did the pending 1905 navigability study raise a potential uncertainty; there were uncertainties inherent in the legal

procedure of appropriation. The "chances" Wilson had to take included the possibility that others might precede him in appropriating the water and thus under Washington appropriation law, 1891 Wash.Laws, ch. 142, § 1, be "first in time [and] the first in right" with respect to the water rights.

[6] Speed in appropriation therefore was essential if Wilson was to be successful in making good the chances that were available to him. Realizing all this, Wilson acted quickly. The Congressional Bill was signed by the President on March 3, 1905, in Washington, D.C. On March 8, 1905, "on a scrubby pine tree" over 3,000 miles away, Wilson posted his Location of Water Right "opposite to the head of what is known as the Little Falls of the Spokane River" (J.A. 178). And promptly at 8 o'clock the next morning, the 9th day of March, 1905, Wilson filed for record a

copy of this "Water Right" with the County Auditor of Lincoln County (J.A. 178). That Wilson acted with such promptness indicates that he was clearly aware he had to be the first in acquiring his water right if he were to secure the right to dam the river. This procedure of posting and filing was sufficient under Washington law to *initiate* the appropriation of "10,000 cubic feet per second of the flow of water in the Spokane River" at the approximate point of posting, i.e., at the Little Falls.

[7][8] It is not necessary to outline further the timing of the subsequent steps that led to the construction of the dam and the related power plant that perfected the Company's appropriation. It is only essential to realize that, following the enactment of the 1905 Act, it was the consent and approval of the Secretary *and* compliance with the laws of Washington and

the rights Wilson acquired by compliance with *both* laws that gave Wilson the final right to excavate and construct the dam to store and divert the waters of the Spokane River at Little Falls. Since the river was *not* navigable, it was, after the 1905 Act, the Secretary's approval *and* Washington law that provided the means both necessary and sufficient to perfect the right to construct the works at Little Falls. The final act perfecting the "appropriation" of the water was the erection of the dam and the *diversion* of the water to "use" in the electrical power plant. This or some other eventual "use" was essential under Washington law, as incorporated into the 1905 Act, or else the water right would be lost. Moreover, water appropriated for one purpose could be changed "to any other beneficial use." *Id.*, § 9.

III. THE INTERPRETATION OF THE 1905 ACT BY THE SECRETARY OF THE INTERIOR

The belated construction of the 1905 Act that the Commission now advances for the first time is also clearly at odds with the contemporaneous and subsequently continuous interpretation by the Department of Interior, which was charged with administering the 1905 Act. 1905 Act, § 2. The express terms of the 1905 Act are on their face quite clear: They show that Congress intended the Spokane River on the southern border of the Reservation to be developed to produce electricity, i.e., "for sites for power purposes ... erection of ... electrical or power plants ... development of power." *Id.* In addition, the contemporaneous interpretation of the 1905 Act by the Department of the Interior provides additional support for the interpretation of the statute presented above.

In his letter of May 4, 1906, to the Commissioner of Indian Affairs, Secretary of the Interior E.A. Hitchcock wrote:

Sir:

> I have considered your communication of the 4th ultimo, submitting the papers in the matter of the application of David Wilson, of Spokane, Washington, for the right to use the waters of the Spokane River, and for the acquirements of land on the Spokane Indian Reservation, for sites for power purposes and other beneficial use of the waters of said river.
>
> By Department letter of November 11, 1905, the Department returned Mr. Wilson's application, with accompanying papers, and advised you that the same would be further considered when amended so as to conform to Department regulations prescribed under the Act of March 3, 1905.
>
> With your said letter of the 4th ultimo you submit an amended application filed by Mr. Wilson under date of January 24, 1906, to conform to the regulations referred to, particularly describing the land desired to be acquired and purchased; and

applying also for the right to erect and maintain any and all suitable water, electrical or power plants, etc., required for the development of power for the beneficial use of the waters of the Spokane River; also for the right to build a dam at the points designated on the map accompanying the said application, and marked "site for dam No. 1," and "site for dam No. 2," reserving to himself the right to hereafter determine at which of said two sites he will erect the dam. The applicant sets forth that he is seeking to acquire the land and water rights in good faith, for the purpose of making certain improvements and developing power, as soon as the rights sought shall be obtained, and the state of the water will, permit; said improvements to consist of a *dam,* power house, flumes, penstock, turbines, electrical generators, transformers, and the necessary pole line to market said power, and all the other requisites to the construction and establishment of a modern electrical power and lighting plant....

* * *

From a careful examination of all the papers submitted, it

> appears that the amended application of David Wilson is in accordance with the requirements of the Department, as set forth in the regulations approved October 3, 1905, prescribed under the Act of March 3, 1905; that he has submitted satisfactory showings as to his financial business and executive ability, and that he actually intends to develop and use the power at the site and for the purposes specified.
>
> In view of all the facts shown in the papers, therefore, and in accordance with your recommendation, *the said application of David Wilson is approved*....

(J.A. 230-32) (emphasis added). The italicized language above places it beyond doubt that the Secretary of the Interior interpreted the Act to authorize him to "consent" to Wilson's application to use the waters, to grant him "the land and water rights" on the Spokane River Indian Reservation, to confer on Wilson "the right to erect and maintain" whatever facilities were necessary to develop the

river for hydroelectricity, "to build a dam" and other improvements necessary to produce and transmit electricity and to *approve* Wilson's application for all the foregoing purposes. *Id*. It is also clear that the Secretary determined Wilson's application conformed to the requirements of the applicable regulations and that Wilson had applied in conformance with said regulations for authority to build a hydroelectric dam. The contemporaneous regulations promulgated by the Department of the Interior, Office of Indian Affairs, on September 28, 1905 in every paragraph breathe their interpretation of the 1905 Act as authorizing the construction of power dams, etc., and as imposing the obligation on the Department of the Interior to pass upon applications therefor and to approve those that comply

with the Act and the regulations.[8] The

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[8] The September 28, 1905 Regulations provided that no applicant could "acquire any rights to the *use* of the waters of the said Spokane River, or to the *use* of the lands in the said Spokane Indian Reservation, under the provisions of this Act, until application therefor [and approval] by the Secretary of the Interior." (Section 2). To obtain such rights applications were required "to describe ... *the area of overflow lands involved* and the extent and dimensions of the *site for proposed works*, and ... such other material facts as to *the possibilities of the development of power* as will furnish data upon which to base an estimate of the value of the rights sought to be acquired." (Section 3).

"Seventh. A map ... showing the location and extent of ... *overflow lands* and sites proposed to be occupied by buildings or other *structures* necessary to be used in connection with the *proposed works and showing in detail the proposed elevation of waters to be contained or controlled*.... Eighth. Evidence of the compliance ... with the laws of the State of Washington concerning the *acquirement* of water rights.... Ninth. A statement of the approximate amount of water flowing in the Spokane River *at the point of diversion or appropriation*.... Tenth. Satisfactory evidence of the good faith of the company and its financial ability in the matter of the *construction of the proposed works*." *Id.*

"4. Upon the approval of an application ... the Indian Service will be designated to *appraise the damages*, tribal and individual, arising by reason of the taking of lands and of *the location and proposed construction of the works*....

"5. No work of construction of any character will be permitted until compensation for the lands to be taken and

(continued...)

Secretary approved Wilson's application and in so doing interpreted the 1905 Act as conferring on the Secretary the authority to make such grants. While Wilson's right of way was later amended upon application by the Company to include additional land necessary for the facility, nothing subsequently occurred to cast doubt on the Secretary's clear approval of Wilson's application to develop the river, which explicitly included, *inter alia*, the right to build, operate, and maintain a dam.

It is clear to this division of the court that the Act authorized the Company

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[8](...continued)
damages done or to be done shall have been determined and paid in manner as herein provided.

"6. The foregoing regulations shall be observed ... by any individual seeking to acquire the rights authorized under the provisions of this act, and particularly as to the purpose, intent, and *financial ability of the applicant.*"

(J.A. 941-46).

to acquire all the necessary "right of way," and that dual compliance with the 1905 Act and the laws of the state of Washington, as embodied in the 1905 Act, authorized the Company to dam the nonnavigable waters of the Spokane River and thereby appropriate the beneficial use of its waters for power purposes.

[9] It is not clear from the record whether the dam ultimately constructed, maintained, and operated by Washington Power occupied either one of the two precise locations for dams on the Spokane River indicated on the map approved October 3, 1905, by the Secretary. *Compare* Exhibit 81 *with* Exhibit 116 (by comparing the maps showing the location of the present dam with that showing the approved sites it is impossible to tell whether the dam was built exactly on approved sites

Nos. 1 or 2).[9] Even if the dam Washington Power ultimately built, however, was not precisely at Dam Site No. 1 or No. 2, as marked on Exhibit 81, the land and other rights granted by the Secretary to Wilson would still be valid as to the existing dam and other structures at Little Falls. Wilson applied to the Secretary for the right not only to build dams at the marked sites, but

> [a]lso the right to erect and maintain any and all suitable water, electrical or power plants, dams, wing-walls, flumes and other needful structures required for the development of power for the diversion of water for irrigation and other beneficial use of said water ...

(J.A. 500). Thus the approval of the application was broad enough to include the dam notwithstanding any minor

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[9] The two sites were within 700 feet of each other and it is clear that the dam was erected at the approximate location that had been approved.

deviation from the marked sites. The Acting Commissioner of Indian Affairs in his letter of transmittal accompanying Wilson's application also reemphasized to the Secretary that Wilson was applying for the right to build a dam (J.A. 506).[10] The Commission's present ruling that the 1905 Act did not authorize the Secretary to authorize the building of dams thus bluntly contradicts the contemporaneous interpretation of the Act by the Secretary and the Commissioner of Indian Affairs.

The Commission's present ruling that the 1905 Act did not authorize Wilson or

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[10] [Wilson] prays further for the right to erect and maintain any and all suitable water, electrical or power plants, dams, wing-walls, flumes and other needful structures required for the development of power, for the diversion of water for irrigation and other beneficial use of said water, and to dam and back up the said water by building a dam at the point designated on the map "dam", giving, as alleged, approximately, one hundred feed [sic] head.

(J.A. 506).

his successors to "*occupy*" the River is equally inconsistent with the Secretary's contemporaneous interpretation. To the contrary, the Department of the Interior had approved Wilson's application "to occupy and improve said waters and the land necessarily incident thereto" (J.A. 180) (emphasis added). *Washington Water Power Company* 25 F.E.R.C. ¶¶ 61,002, 61,0027 (1983) (Butler, Chrmn., dissenting).

Wilson subsequently transferred all his water rights, which included the rights to build and maintain dams and other structures, to Washington Power.[11] The Commission would not have been able to reach the issue not passed upon by the ALJ, namely whether the 1905 Act granted

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[11] See Exhibits 28-30 (J.A. 298-322), 45 (J.A. 422-427), 49 (J.A. 431- 436), 54 (J.A. 444-445), 59 (J.A. 466-524), 62 (J.A. 527-529), 73 (J.A. 534-535) for full documentation of the transfer of rights from Wilson to Washington Water Power.

the authority to build the Little Falls Dam at all, had it not held the transfer was valid. *See* Brief of Respondent at 8. The Commission has thus conceded that the transfer was valid.[12] This transfer may be viewed as having been approved by the Secretary and, as the Commission notes, the Company "informed the Secretary ... of the transfer and did everything necessary to obtain a permit for itself." Indeed,

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[12] The reasoning the Commission applied in approving this transfer was correct, even if it exceeded its authority in reviewing a transfer that had already been approved by the Department of Interior, the agency in charge of approving such transfers under the 1905 Act. This transfer included the transfer of the right to operate and maintain a dam, which was explicitly part of the Wilson's 1906 approved application. Moreover, sections 23(a) and 23(b) expressly prohibit the Commission from "affecting" the transferable "right of way" held by Washington Power by unlawfully rendering it non-transferable. The actions of the Secretary of Interior have already conclusively demonstrated that the rights held under the 1905 Act are transferable. It is therefore absolutely clear that the Department of Interior held that it could issue to Wilson a right of way to build and maintain a dam at Little Falls, and that such right was transferable.

the 1905 Act in section 4 gives the Secretary broad authority to enforce the Act. This includes the authority to regulate any transfers of rights granted by the Secretary under the 1905 Act.

[10][11] In passing on Wilson's application it was necessary for the Department of the Interior to interpret the 1905 Act and it is clear that the Secretary interpreted that Act alone as permitting the granting of the rights to use water and land, to approve the building of the dam on non-navigable waters, and to transfer these rights. The agency empowered to administer the 1905 Act thus made a contemporaneous interpretation of the Act to which the Commission should have deferred. It is well-settled that "the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum v. Bacon,* 457 U.S. 132,

141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982), *quoted in Aluminum Company of America v. Central Lincoln Peoples' Utility District,* 467 U.S. 380, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1984); *Chevron U.S.A. v. Natural Resource Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). This doctrine of deference is particularly sound law in this case. The Department of the Interior, which interpreted and administered the 1905 Act, had longstanding experience in administering similar statutes, as was later demonstrated by the opinion of the Secretary of the Interior expressed in the May 10, 1923 reconsideration of the May 1, 1923 patent issued to Big Bend Transit Company (J.A. 538-45). *See also United States v. Big Bend Transit Co.,* 42 F.Supp. 459 (E.D.Wash.1941). In this opinion by the Secretary he interpreted the 1905 Act as a right of way statute for the

construction and operation of a hydroelectric dam and related facilities on the right of way granted at Little Falls and to regulate the transfer of such rights. Since the Little Falls Development had been completed at that time, his opinion confirms our foregoing analysis that the 1905 Act authorized the Secretary to confer such rights and to authorize such construction. Such interpretation is supported by the plain language of the 1905 Act itself.

The contemporaneous interpretation of the Department of the Interior is all the more to be deferred to in a case like this, where the statute and its interpretation by the Agency is almost eighty years old. Present day constructions of an old statute are likely to be inaccurate for the obvious reason that the older a statute is, the more difficult is the task of reconstructing

the Congressional intent. It is not for the Commission, eighty years later, to attempt now to critique the niceties of how the Secretary of the Interior, in his discretion, fulfilled the mandate of the 1905 Act while it was still fresh in minds of the Congressmen who passed it and agency officials who were designated to enforce it and similar statutes. As Mr. Justice Cardozo observed,

> [Administrative] practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.

Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796 (1933) (citation omitted). *See EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n. 17, 101 S.Ct. 817, 823 n. 17, 66 L.Ed.2d 762 (1981); *Trafficante v.*

Metropolitan Life Ins. Co., 409 U.S. 205, 210, 93 S.Ct. 364, 367, 34 L.Ed.2d 415 (1972); *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1539, 6 L.Ed.2d 924 (1961). Indeed, the construction the Commission presently attempts to blithely circumvent the clear intent of the 1905 Act, is itself strong evidence of the dangers of reinterpreting statutes, so long after they have been enacted, interpreted, and relied upon by private parties and agencies alike.

IV. THE APPLICATION OF THE FEDERAL POWER ACT

[12] It is of the utmost importance to realize that the rights of the Washington Water Power Company in this case are based on a *special* Act, and that a special act prevails in effect over more general acts. *Brown v. GSA*, 425 U.S. 820, 834-35, 96 S.Ct. 1961, 1968-69, 48 L.Ed.2d 402 (1976); *Morton v. Mancari*, 417 U.S.

535, 550-51, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974) (citing cases); *Preiser v. Rodriguez,* 411 U.S. 475, 489-90, 93 S.Ct. 1827, 1836, 36 L.Ed.2d 439 (1973); *Fourco Glass Co. v. Transmirra Corp.,* 353 U.S. 222, 228-29, 77 S.Ct. 787, 791-92, 1 L.Ed.2d 786 (1957); *Townsend v. Little,* 109 U.S. 504, 512, 3 S.Ct. 357, 362, 27 L.Ed.2d 12 (1883); 2A C. Sands, *Sutherland Statutory Construction* § 51.05 (4th ed. 1984). In fact, the 1905 Act is a very "special act" being limited solely as it is to the relatively small area of the Spokane River on the southern boundary of the Spokane Indian Reservation. A construction of the more general Federal Power Act, or the Rivers and Harbors Act which had the effect of rendering the special 1905 Act void would thus be highly suspect. Having settled that the 1905 Act authorized the Secretary to grant parties the necessary rights of way and approval

to build, maintain, and operate the Little Falls facility, "in the Spokane River along the southern boundary of the Spokane Indian Reservation," *see* n. 2, the central question of this case becomes whether these rights fall within the exception recognized and granted in sections 23(a) and 23(b) of the Federal Power Act. FPA, 16 U.S.C. §§ 816 and 817.

Clearly, the right to maintain and operate the Little Falls development is based on a "valid existing right-of-way [previously] granted" that falls within these exceptions. The Department of the Interior interpreted the 1905 Act when that agency reconsidered Washington Power's application for a patent. Having compared the Act of February 15, 1901, 31 Stat. 790, to the 1905 Act which authorized the granting of permanent rights of way, etc., Secretary Hubert Work wrote:

> The fundamental differences, then, between the two acts, are that whereas, by the act of 1901 the right conferred is that of a *mere permit,* revocable by the Secretary of the Interior, under the Act of 1905 (in all respects similar to the act of March 3, 1891, 26 Stat. 1905, in the matter of the extent and nature of the grant, and jurisdiction to terminate the same), such right is a limited fee on an implied condition of reverter in the event the grantee ceases to use or retain the land for the purposes indicated in said act of 1905, *supra,* the termination of which *right of way* or limited fee is not vested in the Secretary of the Interior, but may be effected, upon good cause being shown, only through proceedings had without the jurisdiction of the Department of the Interior, see, in this connection, *Kern River Company v. United States* (257 U.S. 147 [42 S.Ct. 60, 66 L.Ed. 175]). *In other words, both the acts of 1901 and 1905 are right of way acts; the former general in its nature and application, the latter special in its nature and application.*

(J.A. 542) (emphasis added). Thus it is clear that the Department interpreted the

1905 legislation as a special Act authorizing the establishment of valid *"rights of way"* which included authorization to "consent" to the building and maintenance of a hydroelectric dam, which was granted well before June 10, 1920.[13] It is significant that this opinion of the Department rendered on May 10, 1923, is a contemporaneous interpretation of the Federal Water Power

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[13] The above quotation is merely one of many that could be cited to the same effect. In fact, the record is so replete with references to "dams," "power sites," "construction" and so on that it is absolutely clear that the Department of the Interior, the Commissioner of Indian Affairs, the Indian Agents in the field and all other parties involved in the enforcement of the 1905 Act understood it to authorize the construction, operation and maintenance of a power dam and other structures necessary to produce power. These documents are set forth as *Appendix Document No. 9 to the Reply Brief of the Petitioners*, and constitute overwhelming evidence that all the federal officials responsible for administering the 1905 Act construed it to authorize the construction, operation and maintenance of a dam.

Act of 1920 and its application to rights granted under the 1905 Act.

The Commission, however, now proposes a different analysis of the 1905 Act and its relation to sections 23(a) and 23(b) of the Federal Power Act. FERC first states part of the legislative history of sections 23(a) and 23(b): Those sections of the bill as originally introduced provided for "*revoking* any permit or valid existing right of way heretofore granted or as *revoking* any authority heretofore given pursuant to law" instead of prohibiting their being construed "as *affecting* any permit or valid existing right of way ... or ... authority" (emphasis added). On June 25, 1919, Gifford Pinchot, revered as one of the fathers of the conservation movement, suggested changing "revoking" to "affecting" in order to make it clear that *revokable* permits (like that created by

the 1901 Act from which the 1905 Act departed) would not become irrevocable by virtue of the passage of Federal Water Power Act of 1920, 41 Stat. 1075 (1920) ("FWPA"). The Commission now states in its current Opinion No. 117A that the language of section 23(a) was intended neither to diminish nor enlarge rights held under pre-FWPA permits. 25 F.E.R.C. ¶ 61,002 at 61,014. Thus, FERC rules in its current Opinion No. 117 that Washington Power could continue to occupy lands of the Spokane Indian Reservation and utilize waters of the Spokane River for the Little Falls development, but could not continue to operate and maintain its dam without a license under section 23(b). In the Commission's view, this would be an "enlargement" of the original 1906 and 1908 permits. This result, the Commission contends, "strikes a balance between preserving the authority of the pre-FWPA

permits, and refraining from enlarging that authority;" it contends, that is, that to uphold the Company's position would enlarge the right of way granted under the 1905 Act to construct and operate the dam. In fact, the Commission's argument refuses to recognize the full "right of way" authorized by the statute, which was granted and consented to by the Secretary, and then balances its misconstruction against a result which assumes the validity of its misconstruction. All the emphasis on "enlargement," etc., in reality is an attempt to impose a standard different from the statutory standard. The statute expressly prohibits the Commission from doing anything that could be construed as "affecting any authority" or "existing right-of-way." When that standard is applied, the Commission's construction clearly falls.

The Commission's position is that the right of way is separate from the right to *use* it. This is an incongruous outcome, since under the 1905 Act, and the laws of Washington providing for the appropriation of water rights that the 1905 Act incorporates, the right to the *beneficial use* of the water implicitly follows from the acquirement of the water rights and the land. The rights in the land were acquired by "grant" from the Secretary and the water rights were acquired by appropriation under the laws of *Washington* with the "consent" of the Secretary. The title of the Act indicates that its purpose is to provide for "the acquirement of water rights [and] lands ... for sites for power purposes, *and the beneficial use of said water*." The three go hand in hand. In keeping with the title, the first section of the 1905 Act provides: "The right to the *use* of the waters of the

Spokane River ... may with the consent of the Secretary ... be acquired ... by appropriation under ... the laws of ... Washington." The statute then continues: "the Secretary ... is authorized and empowered to *grant* such appropriator [of the water rights in the Spokane River] ... *land* ... such as shall be necessary ... for the erection ... [of] dams [etc.] required for the development of power or *for the beneficial use of said water....*" *Id.* § 2. "[T]he right to the *use* of the waters of the Spokane River" as provided for in the first section of the Act, is just another way of recognizing that the appropriator may *beneficially use* his water rights by "the erection ... [of] dams ... for the development of power." *Id....* As a practical matter, in the context of the statute, water rights and land, appropriated, consented to and granted "for the development of power,"

could not be *used* in any way other than by a dam.

The effect of the Commission's ruling would be to strip Washington Power of its *valid* right of way to operate and maintain the dam at Little Falls, and in effect to revoke that right. However, the applicable statutes the Commission relies upon recognize the continuing validity of any "valid existing right-of-way", FPA § 23(b), and provide that they "shall not be construed as *affecting* any permit or valid existing right of way ... granted prior to June 10, 1920 ... or as *affecting* any authority heretofore given pursuant to law." FPA § 23(a), 16 U.S.C. § 816 (emphasis added). For the Commission to require now, some 75 years after the completion of construction, that the Little Falls dam be licensed so that Washington Power may continue the "beneficial use" of its water rights

acquired by appropriation in 1906-10, clearly would "affect" the existing right of way in a very concrete way: It would deny Washington Power the right to the beneficial use of the waters diverted by the dam without further license. It would also drastically reduce the value of all the real property involved. The license the present Commission seeks to require Washington Power to acquire to operate and maintain the Little Falls facility would, if granted, expire after fifty years. Upon this expiration, the Little Falls development could be appropriated by the United States or transferred to some other party. Washington Power would need to be compensated in this event only according to the "net investment formula" which may well be much less than the market value of the transferable limited fee currently held by the Company.

[13] Thus the Commission proposes actually to obliterate the right of way for the beneficial use of its water rights that the Company currently holds, a limited fee with implied reverter for non-use, see *Big Bend Transit Co.*, 42 F.Supp. 459 (E.D.Wash.1941), by forcing it to apply for a license to run for a fifty year term, at the end of which the right to maintain and operate the dam would be up for license. This obviously *affects* the Company's right of way: Instead of having the right to use the "lands ... for [a] site[ ] for power purposes, and the beneficial use of said water" in perpetuity so long as it is used for the production of electric power or some other beneficial use, and the water so long as is consistent with Washington law, the Company would have merely the right to produce power for the term of the license. This would affect Washington Power's right

of way in a manner prohibited by sections 23(a) and (b) of the Federal Power Act. Therefore Washington Power is exempted by the statute from being required to apply now for a license to operate and maintain the Little Falls facility under the Federal Power Act because its "valid existing right-of-way [was] granted prior to June 10, 1920." FPA § 23(b), 16 U.S.C. § 817.

We need not reach here the question of what compensation would be due for the revocation or acquisition of Washington Power's property rights in the Little Falls hydroelectric development. No state, municipal or federal entity now seeks to condemn the property under eminent domain. Nor does Washington Power voluntarily seek to exchange its valid right of way for a license under section 23(a). And since this case holds that the Federal Power Act exempts Washington Power from being

required by the Commission presently to acquire a license for the Little Falls development under the Federal Power Act, we do not reach the issue of whether such a licensing requirement would be a "taking" under the Fifth Amendment to the Constitution. It is clear, moreover, that the existing development at Little Falls did not from 1911 on lack any necessary authority for its construction, operation or maintenance or for its continuing operation and maintenance. Washington Power is therefore not required to apply for or obtain a license. Thus it is not at present subject to the cost-based "net investment" formula, as the Commission concludes are projects without pre-FWPA authority.

It follows from this analysis that Washington Power therefore has the option, but is not required, to exchange its current right of way for a license under

the Federal Power Act. It should also be noted, however, that the right to occupy the river and to use the flow of the stream were acquired under the 1905 Act and Washington law and are property rights under that law. *Thompson v. Short,* 6 Wash.2d 71, 106 P.2d 720 (1940) (appropriative right is real property); *Tedford v. Wenatchee Reclamation Dist.,* 127 Wash. 495, 221 P. 328 (1923) (same); *Madison v. McNeal,* 171 Wash. 669, 19 P.2d 97 (1933) (right to appropriated water flowing naturally or in control works is an incorporeal hereditament). Since the 1905 Act, and subsequent enactments, incorporated these aspects of Washington property law by reference, Congress has already approved the acquisition of property rights in the water rights in the Spokane River acquired under the 1905 Act and the Washington law of appropriation. It is therefore clear that the present law

cannot be construed to authorize the federal government simply to seize this property without paying just compensation, any more than it could seize land which Congress had authorized the federal government to sell and which had already been sold to private parties, without paying just compensation.

V. NAVIGABILITY OF THE SPOKANE RIVER

In addition to contending that the Company must apply for a license because the Spokane River is, in fact, "now" navigable at Little Falls, the Commission also contends that the River was a navigable waterway of the United States in 1906-10 when the Secretary consented to and granted authority for the Little Falls development in accordance with the 1905 Act. We will deal with both contentions.

The river in its relevant stretches was not navigable when the Little Falls development took place. At that time the

provision of the 1905 Act authorized the construction and operation of the Little Falls dam and the "beneficial use" of the water rights appropriated under the laws of Washington.

The Spokane River starts as the outlet of Couer d'Alene Lake in Idaho and flows generally northwest for 105 miles to join the Columbia River in Washington at Mile 317 above the Snake River. From its source to its confluence with the Columbia it has a total fall of 1,075 feet. This represents an average fall of 10.2 feet per mile over its entire length. The river is navigable *within Idaho* from Couer d'Alene Lake for eight miles to Post Falls, Idaho, five miles east of the Washington-Idaho boundary, where there is a natural drop of 40 feet. This stretch of the river from the lake to Post Falls is not obstructed by rapids and in 1932 had a fair depth due to the back water from the

Post Falls dam. The floating of logs is the only commerce on this eight mile section of the river, which is entirely in Idaho.

[14] As will be developed subsequently, the 97 miles of the river below Post Falls was *not* shown to be navigable either in Idaho or Washington when Little Falls was developed. From the foot of Post Falls to the head of Spokane Falls in Washington, 20 miles west of the state line, the river flows through a comparatively wide and level valley but has an average fall of 10 feet or more per mile. Spokane Falls is a series of falls and cascades with a natural drop of about 150 feet. It is also relatively shallow except during the high water season. Logs had been floated from the lake to Post Falls in Idaho but there was no general practice of driving logs below Post Falls across the state line into Washington, so

far as this evidentiary record demonstrates, except occasionally in *high water* many years ago. As the 1932 Report of the Army Engineers states:

> It would be impractical either to row a boat or drive logs between Spokane and Post Falls during the low water season, which averages about five months a year, *on account of the many rapids and very shallow depth of water*. During the season of high water, about three months of the year, the velocity of the water is so great that commercial navigation would be impractical and uneconomical due to the excessive power that boats would require.... There is no record to indicate that the Spokane River has ever been used as a highway for interstate commerce, and the river is not generally and commonly useful in any trade or agriculture.

Ex. No. 87 (emphasis added). *Report of Army Engineers,* 1932 (J.A. 621). The floating of logs during *high water* does not establish that this stretch of the River is a "navigable" stream. *United States v. Rio Grande Dam & Irrigation Co.,*

174 U.S. 690, 698, 19 S.Ct. 770, 773, 43 L.Ed. 1136 (1899) ("The mere fact that logs, poles and rafts are floated down a stream occasionally and in times of *high water* does not make it a navigable river") (emphasis added); 16 Am.Jur.2d 511, Waters, § 67 n. 65. A river is a navigable waterway of the United States if it constitutes a continuous highway capable of use for the purposes of transportation and commerce with other states or foreign countries in the customary modes in which such commerce is conducted by water or which may be made available for navigation given *reasonable* improvements. *The Daniel Ball,* 10 Wall. 557, 563, 77 U.S. 557, 563, 19 L.Ed. 999 (1871); *The Montello,* 20 Wall. 430, 441, 87 U.S. 430, 441, 22 L.Ed. 391 (1874); *United States v. Utah,* 283 U.S. 64, 51 S.Ct. 438, 75 L.Ed. 844 (1931); *United States v. Appalachian*

Electric Power Co., 311 U.S. 377, 406-08, 61 S.Ct. 291, 298-99, 85 L.Ed. 243 (1940).

"Below Spokane Falls the river is not navigable and *never* was navigable except for short stretches."[14] This stretch of the river "flows through a deep canyon flanked by high lands" most of the way.[15] With an average drop of 10.8 feet per mile, the river thus flows with high velocity and its "bed ... is composed principally of boulders, which cause a great many rapids; and the river is also obstructed by numerous falls."[16] "No improvements of this river have ever (1932) been authorized by Congress."[17] The physical characteristics of the river, as

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[14] Report of Army Engineers, 1932; Ex. No. 87, ¶ 13 (J.A. 621-25).

[15] *Id.*, ¶ 5.

[16] *Id.*, ¶ 4.

[17] *Id.*, ¶ 14.

described in the official reports of the Army Engineers, thus made it nonnavigable from Post Falls to its mouth.

The Little Falls development is located on the Spokane River 70 miles below Post Falls, 45 miles below Spokane Falls and 29 miles from its confluence with the Columbia River (J.A. 637-42). According to the Report of the Army Engineers in 1932 there was no commerce on the Spokane River. The report further concluded:

> 17. Logs have been floated down the Spokane River to Post Falls; but there has been no general practice of driving logs below Post Falls, and the present practice of lumbering interests is to bring logs to their mills by either railroad cars or auto trucks.
>
> 18. With the exception of the one boat mentioned in [a] letter quoted in paragraph 13, there is no record of any boat traffic between Spokane and Post Falls.

> 19. If the river were ... useful, it would have been used for such purposes, especially in the earlier days of settlement before the development of other means of transportation. It is believed that the *physical characteristics* of the river explain the failure to use this river for purposes of navigation.
>
> 20. The navigable portion of the Spokane River, which is that portion between Post Falls and Coeur d'Alene Lake, lies wholly within the State of Idaho.
>
> 21. It is concluded that *the Spokane River is not a navigable waterway of the United States, because the interstate stretch—between Spokane, Wash., and Post Falls, Idaho—is neither used nor susceptible of being used in its ordinary condition as a highway for commerce.*[18]

The nonnavigable character of the Spokane River from its mouth to Spokane Falls is corroborated by the Report of April 21, 1882 by Lt. T.W. Symons, Corps of

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[18] *Id.* (emphasis added).

Engineers, U.S. Army, transmitted by the Secretary of War to the United States Senate in response to Senate Resolution of April 5, 1882, "[r]especting the navigable waters of the Upper Columbia River and its tributaries."

> The Spokane River ... flows through a cañon very similar to that of the Columbia, and about 2,000 feet below the general level of the plains to the south. It is broken by many rapids and falls, and is entirely unnavigable. From its mouth up to Spokane Falls, about seventy miles, this cañon is very deep and difficult to cross or traverse.

Ex. 159 (J.A. 766-70) (emphasis added). As indicated above at page 24, the nonnavigability of the Spokane River below Post Falls was also confirmed in 1905 by the Engineer on the ground (J.A. 623).

The War Department and the Army Corps of Engineers are the agencies that are directed to study and report on the nation's rivers, and they are empowered by

the Rivers and Harbors Act to approve plans for dams, bridges, etc., that would obstruct navigable rivers of the United States. Their duties included the investigations in the field necessary to determine whether streams were navigable waters of the United States and they carried out these duties with respect to the Spokane River. *See* n. 20, *infra*. Their official reports thus carry particular weight. The official U.S. Geological Survey maps of the Spokane River over its entire length, from Couer d'Alene Lake to its confluence with the Columbia 105 miles to the West, indicate that numerous railroad and highway bridges cross over the River. The River Mile Index of the Spokane River from Little Falls to Couer d'Alene Lake (undated) indicate that 32 bridges cross the river (10 railroad bridges and 22 highway bridges) (J.A. 637-42). Yet the official *List of Bridges*

Over the Navigable Waters of the United States, as compiled by the Chief of Engineers, United States Army, and revised to January 1, 1935, U.S. Government Printing Office, 1936, did not include *any bridge* over the "Spokane River."[19] This publication of the Army Engineers consists of 461 printed pages, and includes *every* railroad or highway bridge that crosses any navigable water of the United States. No where does this official publication mention the "Spokane River." The conclusion is inescapable from this, and all its prior Reports on the Spokane River, see n. 20, that the Army Engineers found that the Spokane River was *not* navigable.

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[19] We take judicial notice of the United States Geological Survey maps covering the Spokane River and the Army Chief of Engineers List of Bridges Over the Navigable Waters of the United States (1936) pursuant to Fed.R.Evid. 201.

If the Spokane River was a navigable water of the United States at the time the Secretary of Interior gave his consent to Wilson to appropriate and use the Little Falls water rights, and approved the several applications for rights of way necessary to build and maintain the dam, his actions may have been in violation of the Rivers and Harbors Act, 33 U.S.C. § 403. This Act requires that plans for building a dam that would obstruct a navigable waterway of the United States be consented to by Congress and approved by the Chief of Engineers and the Secretary of the Army. This was apparently not done in the case of the Little Falls dam. Thus, if the Spokane River was a *navigable* waterway of the United States at the time and place covered by the applications of Wilson and the Company, the Secretary of Interior's approval may have been insufficient under the Rivers and Harbors

Act. However, such approval was not required because the river was not navigable.

The Commission's error is in finding, without substantial evidence, that the Spokane River was navigable. The findings, conclusions and interpretations of the War Department and Army Engineers conclusively demonstrate that at the time the Little Falls facility was constructed the Spokane River was entirely unnavigable.[20] However,

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[20] In 1881, the War Department investigated the Spokane River and determined it was not navigable. Sen.Doc. No. 186, 47th Cong., 1st Sess., (1982); Exhibit 159 (J.A. 764-70). Pursuant to the Act of July 13, 1892, 27 Stat. 88, the Army Corps of Engineers undertook to determine whether the Spokane River was "worthy of improvement." The 1893 Annual Report of the Chief of Engineers concluded it was not. *See* Opinion No. 117A at 11 n. 9, 25 F.E.R.C. ¶ 61,002 at 61,024; Washington Power Supplemental Appendix, No. 2. In 1905, the District Engineers of the Army Corps of Engineers wrote that the river was not navigable downstream from Post Falls, Idaho (J.A. 623). In 1932, the Army Chief of Engineers, after an investigation, determined the river was not navigable (J.A. 621-25). The river was therefore officially determined to be non-navigable at Little Falls on four different occasions.

the Commission does not recognize any necessity to evaluate the evidence of the river's physical features, or to be influenced by the conclusions of the official Reports of the Army Engineers, which constitute the only reliable probative evidence presented on the issue of navigability—an issue that is largely determined by the facts.

The Commission's brief argues that the Spokane River has *always* been a "navigable waterway of the United States." FERC Brief, pp. 23-24. However, it advances no respectable evidentiary support for this conclusion. It claims reliance principally on some flotation of logs from Post Falls, Idaho to Spokane Falls, Washington in the early days; but it advances no substantial evidence that is sufficiently probative to conclude that such flotation supports a claim of navigability. It does not advance any

evidence from which it could be reasonably concluded that any logs were ever floated down river below Post Falls except during periods of *high water* and then only to a point *above* Spokane Falls. The Commission has not advanced one iota of evidence of any commerce of *any* character over the 70 miles of the River from Spokane Falls to its confluence with the Columbia. This is fatal to the Commission's claim. The Little Falls Development is on this stretch about 45 miles below Spokane.

The items of evidence that the Commission brief (pp. 23-24) relies upon to support its claim of navigability by the flotation of logs for the short distance from Post Falls to Spokane Falls are itemized and their complete deficiency as probative evidence pointed out in the margin.[21]

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[21] (1) First, the Commission cites Ex. No. 126, a pamphlet published in 1952 entitled "Steamboats in the (continued...)

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[21](...continued)
Timber." This contains a brief reference to a log drive in "early days" to McGoldrick's Mill not far above Spokane Falls *"in early spring"* (J.A. 735) (R. 1193-96), i.e., *high water time.*

(2) Exhibit 130 is a map *"allegedly"* identifying the Spokane River as a public highway for logging activities as declared by the Washington Legislature in 1875 (R. 1211, J.A. 750). However, while the entire river is "Declared Public Highway for Logging by Act of Washington 1875," it is only from Lake Couer d' Alene to Spokane Falls that the river is *marked:* "Past Usage for Logging." Thus, even this bit of weak and inconclusive evidence does not indicate that the river *from Spokane Falls to* the Columbia, which includes the Little Falls stretch, was *ever used* for floating logs. In fact the marking on the map indicates that "Past Usage for Logging" stopped at Spokane Falls. Thus the conclusion is obvious that there was no "Past Usage for Logging" from Spokane Falls to the Columbia. Furthermore, the mere marking on the map above Spokane Falls is insufficient to prove the requisite navigability because of a lack of any indication as to when this stretch of the river was used "for logging." This map does not constitute probative evidence as to the time of year that "logging" occurred or as to whether it was limited to times of high water.

(3) Exhibit No. 127 is a 1958 pamphlet entitled "Sawdust Empire" (J.A. 736- 39). The pamphlet recites that a "sawmill [was] erected ... [in 1873] on the banks of the Spokane River near the falls ... was not successful, for the saws could not cut through the large logs that were floated down the River...." (R. 1197-1201, J.A. 738). Again, this

(continued...)

[21](...continued)
1958 publication lacks any reference to the *time* the logs were floated down the river. There is no indication as to the time of year that the logs were floated.

(4) Exhibit No. 129 *allegedly* "contains an 1884 newspaper account of a log drive down the Spokane River to Spokane Falls" (R. 1209, J.A. 747). This claim at page 24 of the Commission's brief is bizarre. It claims that its assertion of navigability is supported by a newspaper story in a Spokane newspaper of June 30, 1884 reporting that a "Tom Johnson was drowned today while driving logs a *couple of miles* from Fort Couer d' Alene, on the Spokane River" (J.A. 747) (emphasis added). But Fort Couer d' Alene was built in 1878 on a "thousand acres *near the outlet*, where the lake [Couer d' Alene] drains into the Spokane River. Much of this thousand acres is *now within the boundaries of the City of* Couer d' Alene" (J.A. 733). Couer d' Alene is *in Idaho* about 12 miles *east* of the Washington state line. Thus, one driving logs *"a couple of miles"* from the Fort would clearly be in Idaho and most likely east of Post Falls, Idaho. The river above Post Falls was always recognized as navigable, but only within Idaho, and Johnson's drowning does not indicate interstate navigability. The newspaper's statement that Tom "has a brother in Helena, Montana" (J.A. 747) is insufficient to support the necessary interstate element for the log traffic.

(5) Exhibit No. 128 (R. 1202-07, J.A. 741-46) is an opinion, 50 Fed. 429, by a U.S. District Judge, Circuit Court, D. Idaho, of April 9, 1892, from which the Commission's brief quotes the statement that the "Spokane River is of sufficient size and of such a channel as to be held

(continued...)

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[21](...continued)
a public highway" (R. 1207, J.A. 746). But this is *not* the holding by the Court. The opinion continues, but the Commission brief omitted the following significant statement: *"If this indication is confirmed by a full production of the facts,* its waters must so far flow unfettered that they may be utilized by the public for transportation purposes" (J.A. 746). The omission is telling and adverse to the Commission's contention.

This was a case *in Idaho* which sought an injunction against one Post from placing obstructions in the Spokane River that prevented floating down the stream a lot of logs it *"now"* has just above such obstructions. Since the date of the opinion of the District Judge was *April 9,* 1892 its reference to "now" is another indication of high water time (J.A. 742). The judge also stated: "The facts are not fully before me ..." (J.A. 743) and that: "It is unnecessary to discuss the old English rule and definition of a navigable stream" (J.A. 746). He did state that the "Spokane River is of sufficient size and of such channel as to be held a public highway" (R. 1207, J.A. 746), but he was obviously speaking of the river in Idaho above Post Falls. That short stretch of the River in Idaho was always considered to be navigable, but only from the lake to Post Falls, *in Idaho.*

(6) The Commission brief also cites a statement in Exhibit No. 133. This is a publication entitled "American Lumberman" which reports that on August 25, 1900, *a United States Marshal* "handed down a decision" that the Spokane River was a navigable stream (R. 1217, J.A. 756). The exact quotation is:

(continued...)

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[21](...continued)

> In the case of complaint against the Spokane & Idaho Lumber Company for violating the federal statutes in allowing sawdust and other refuse to enter the Spokane river, a navigable stream, the United States marshal has handed down the following decision:
>
> "That the defendant did allow refuse and other material to enter the river from its mill."
>
> "That the river is a navigable stream."
>
> "And that the defendant has violated the statute when it threw this refuse in a navigable river, whether it obstructed navigation or not."
>
> The decision is subject to review by a *higher court* ...

(J.A. 756) (emphasis added). This does not indicate whether the mill was in Idaho or Washington, and there was no indication where the sawdust was dumped. Likewise, it is not presently considered that the statement of the Marshal is equivalent to a court decision (J.A. 756).

The foregoing sets forth all the evidence that the brief of the Commission asserts in support of its claim that the Spokane River was a navigable water of the United States. The probative effect of the official Reports of the Army Engineers that the Spokane River was *never* a navigable waterway of the United States far overshadows the foregoing claims to evidence advanced by the Commission. The Commission's contention that the foregoing evidence supports its claim is obviously deficient.

In contradistinction to the deficient evidence of navigability that the Commission advances, the Report of the Army Corps of Engineers on the navigability of the Spokane River even as late as 1932, as quoted and described above, constitutes substantial *evidence* that the entire length of the Spokane River was *not* a navigable river of the United States prior to the completion of Grand Coulee Dam in 1942 (J.A. 765), *see also* Reports of Army Engineers itemized in n. 20, *supra*.

Our above description of the Commission's excursions in search of evidentiary support, some outside the record, and all constituting data of dubious probative value, demonstrate the tenuousness of the Commission's conclusions on navigability. *See also* 25 F.E.R.C. ¶ 61,002 at 61,027 (Butler, Chrmn., dissenting). The Commission's

de novo review reaches the height of absurdity, however, when it holds that the Spokane River has *always* been navigable because only one improvement was necessary to make it so, that is, the construction on the Columbia River of the Grand Coulee Dam, the largest concrete structure in the world.[22] One of the great engineering marvels of this century, the Grand Coulee Dam created a 51-mile long lake in the Columbia canyon and backs water 29 miles up in the canyon of the tributary Spokane River to the tail race below the Little Falls development. 29 F.E.R.C. ¶ 61,002 at 61,003.

The Commission apparently views this immense project as the sort of "artificial aid" to navigation to which the Supreme Court referred in *United States v. Appalachian Electric Power Co.*, 311 U.S.

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[22] Guinness Book of World Records 269 (1981).

377, 61 S.Ct. 291, 85 L.Ed. 243 (1940). 25 F.E.R.C. ¶ 61,002 at 61,005. This is implausible. *Appalachian* limited the situations where a river is susceptible to being made navigable given "a balance between cost and need at a time when the improvement would be useful." 311 U.S. at 407-08. The Grand Coulee Dam was not an improvement that was *reasonable* in cost and need to make the Spokane River navigable. The cost was extraordinary and the improvement of the navigability of the Spokane river was minimal—only from the confluence with the Columbia to the tail race *below* the Little Falls Development. As to the reasonableness of the cost, *Mason Co. v. Tax Comm'n,* 302 U.S. 186, 192, 58 S.Ct. 233, 236, 82 L.Ed. 187 (1937), recites that the Grand Coulee project, as originally contemplated by the War Department and the Department of the Interior, included a dam at Grand Coulee

to be 370 feet high above low water (550 feet high as actually constructed)[23] and 4,290 long on the crest, a power plant to develop 2,100,000 horsepower at a contemplated total cost of $392,000,000 in depression dollars. It created a lake 51 miles long and stored over 5,000,000 acre feet of water. Improving navigability on the Spokane River was one of its very minor purposes.

[15] While the Grand Coulee Dam did create a navigable lake, it is absurd to suggest that it is the sort of "artificial aid" that would retroactively convert the entire Spokane River into a navigable water of the United States back to a time when dams were constructed with the aid of mules and man-operated wheelbarrows. Such theory would make practically all streams navigable; the gnarliest rivulet in the

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[23] The Washington Monument is 555 feet high. World Book Encyclopedia.

Rockies might be made to accommodate pleasure craft if the energy and enormous capital outlay it took to build Grand Coulee were devoted to the task. The Supreme Court was not so obtuse as to miss this problem in deciding *Appalachian*. Thus the Court in *Appalachian* wrote, "The district court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree." 311 U.S. at 407, 407 n. 26. Navigability must be achieved at a *reasonable cost*. The "contemplated" cost of $392 million in depression (1933) dollars, is not a "reasonable cost" to make the tributary Spokane River navigable only from its mouth to Little Falls. We may safely conclude, following the *Appalachian* Court, that as a matter of degree the Court did not mean to include concrete works of titanic proportions (550

feet high and 4,290 feet long)[24] involving "high engineering skill and the expenditure of vast sums of money" as reasonable improvements to navigability. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 699, 19 S.Ct. 770, 773, 43 L.Ed. 1136 (1899); *Appalachian,* 311 U.S. at 408-09, 61 S.Ct. at 299-300.

[16] At all times relevant to this case the Spokane River was *not* navigable. It was properly found *not* to be navigable by those to whom that duty was assigned and the evidence of the physical features of the river as described in all the Army Engineer's reports over half a century, see n. 20, *supra,* are convincing probative evidence of the fact that it was not navigable in fact when the Little Falls development was constructed. Thus, under

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[24] *Mason Co. v. Tax Comm'n,* 302 U.S. at 192, 58 S.Ct. at 236, *supra.*

the terms of the 1905 Act Washington Power and Wilson were authorized to construct the Little Falls development without obtaining the approval of the War Department or Chief of Army Engineers, since it could not be anticipated, some thirty years before the fact, that the largest concrete dam in history would someday flood the lower reaches of the Spokane River Valley to the tail race below Little Falls and make navigable a part of a stream that was formerly all but impassable by canoe.

The Commission's failure to give adequate deference to the 1932 Army navigability report and all its earlier reports, *see* n. 20, *supra,* is further shown in its selective reading of Exhibit 159 (the 1893 report on navigability). This reading by the Commission, however, does no more to support its finding of navigability than does its viewing Grand

Coulee as a reasonable navigation aid. The *conclusion* of the 1893 report was that the river was *not* navigable, 25 F.E.R.C. ¶ 61,002 at 61,024 n. 9, and to use that report in the selective manner the Commission does in its attempt to support the conclusion of navigability is to contradict its own evidence and make a mockery of the deference properly owed to the authoritative findings on the river's navigability at the times relevant to this case.

Even if there were something to the Commission's bizarre route through the navigability question, it neglects the doctrine that a river may be found to be navigable in part and nonnavigable in part. *United States v. Utah,* 283 U.S. 64, 89-90, 51 S.Ct. 438, 445-46, 75 L.Ed. 844 (1931). Insofar as this case is concerned the authoritative findings by the Army Engineers are controlling: "Below Spokane,

the river is not and never was navigable except for short stretches...." Ex. 87, April 29, 1932. And Congress *never* found it necessary to consent to the erection of any of the many bridges over the river. No substantial evidence contradicts these conclusions or the facts upon which they are based. There is nothing in this record which suggests that when the Little Falls dam was erected it obstructed a navigable portion of a navigable river of the United States, even if some intrepid lumberjacks did manage, *during high water* some 65 to 45 miles upstream from Little Falls, to float some logs down a short stretch of the river.

At the present time, that part of the Spokane River from the Little Falls Development to the Columbia is now recognized as navigable by the Army Corps of Engineers (J.A. 634-35). This was due to the completion of the Grand Coulee Dam

as we note above. 25 F.E.R.C. ¶ 61,002 at 61,003. Thus the Commission would have jurisdiction to license any *new* structures built on the now *navigable* portion of the River under the Federal Power Act. It cannot, however, expunge the fact and the determinations that the river was *not* navigable when the Little Falls development was authorized and constructed, and by so doing evade the provision of section 23 of the Federal Power Act that none of the "provisions" of the present Act shall "be construed as affecting any permit or valid existing right of way ... granted [before June 10, 1920] ... or as affecting any authority ... given pursuant to law [before June 10, 1920]." § 23(a), *supra*.

The Commission claims reliance on our earlier decision in *Pennsylvania Water & Power Co. v. FPC*, 123 F.2d 155 (D.C.Cir.1941), *cert. denied*, 315 U.S.

806, 62 S.Ct. 640, 86 L.Ed. 1205 (1942), for the proposition that an operator of a hydroelectric project could not rely on a previous holding in 1904 of nonnavigability by the Secretary of War under the Rivers and Harbors Act with respect to *another project* in Maryland (a bridge on the same river), as implied consent for the erection and maintenance of the company's structure in Pennsylvania. The *Pennsylvania* case involved a 1938 order by the Federal Power Commission that the Power Company obtain a license under section 23 of the Federal Power Act for its power dam built between 1905 and 1909 (FPC Brief, p. 5) in the Susquehanna River near Holtwood, Pennsylvania. As set forth below our decision in *Pennsylvania* is clearly distinguishable on the facts, and is not precedent on the issues raised with

respect to the development at Little Falls.

First, the court in *Pennsylvania* found that the evidentiary record going back to 1797 supported the Commission's finding that the Susquehanna *was* a navigable river of the United States when the Holtwood Dam was constructed, while the evidence here with respect to the Spokane River is that it was *not* a navigable river of the United States, when the Little Falls Dam was built.[25]

Second, the Holtwood dam was not built on a "valid" right of way because the provisions of section 9 of the Rivers and Harbors Act of 1899 were fatal to Pennsylvania's claim and the Company could point to no statutory authority. Section 9 provided, *inter alia:*

> that such structures [dams] "may be built under authority of the

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[25] *See* discussion at p. 326, *supra.*

> legislature of a state across rivers ... the navigable portions of which lie *wholly* within a single state, *provided* the location and plans are submitted to and approved by the Chief of Engineers and the Secretary of the Army before construction commenced....

33 U.S.C. § 401 (emphasis added).[26] The Company contended that the Susquehanna was not a navigable river of the United States but was *only* navigable within Pennsylvania. It had never submitted the location and plans for the dam for the statutorily required federal authority. In

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[26] The court sustained the FPC's ruling that the Susquehanna at the location of the dam was a navigable water *of the United States* despite a ruling in 1904 by the Secretary of War that the river was only navigable in one state, i.e., Pennsylvania, and that the Pennsylvania Railroad therefore had a right to build a bridge over the river at Havre de Grace, Maryland. However, no authorization was ever obtained from any federal official to build the Holtwood Dam and there was no special act of Congress authorizing such construction. The Little Falls development is distinguishable on both grounds--(1) the Secretary of the Interior authorized the project, and (2) the authorization conformed to a special Act of Congress.

thus admitting that the dam was erected in waters that were navigable *"within a single state,"* i.e., *Pennsylvania,* given the requirements of section 9, the company was hung by its own theory. Here, however, the record reflects that the Little Falls dam was not erected in any waters that were navigable within Washington. Even if they were, there is considerable force to the argument that Congress in its *special* Act of March 3, 1905, applicable *only* to the Spokane River along the southern boundary of the Spokane Indian Reservation, had provided a complete alternative to section 9 of the Rivers and Harbors Act and compliance therewith was all that was required to establish the *"valid* ... right-of-way" required by section 23.

Third, the Pennsylvania Power Company was never "granted ... any ... right-of-way [or] ... authority" by any

federal authority, such as Wilson and Washington Water obtained here by the consent, grant and authorization from the Secretary of Interior in accordance with the 1905 Act. Hence the Pennsylvania Power Company was not entitled to the exemptions in section 23 which are available here to Washington Power and which are fatal to the Commission's contentions. It follows that the decision in *Pennsylvania Water & Power Co.*, has no application to this case because the Little Falls development satisfies the section 23 conditions for exemption, and the Spokane River at Little Falls was *not* shown at the relevant times to have been on a *navigable* stretch of the river, interstate or intrastate.

In *Pennsylvania,* this court, citing *Newport & Cincinnati Bridge Co. v. United States,* 15 Otto 470, 480, 105 U.S. 470, 480, 26 L.Ed. 1143 (1881), held that "the supervision and control by Congress of

navigable waterways 'is continuous in its nature' and no part of this power and supervision 'will be presumed to have been surrendered unless it was manifestly so intended.'" 123 F.2d at 162. This case would support the Commission insofar as it relies on the decision to support its jurisdiction over any *new structures* proposed for stretches of the Spokane River that are "navigable waters of the United States."[27]

The rights acquired by Washington Power from Wilson and approved by the Secretary of Interior were not conditioned, however, on the river remaining nonnavigable, nor are the exemptions in section 23 so conditioned. In fact, when enacted, they expressly

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[27] Similarly *Montana Power Co. v. FPC*, 185 F.2d 491 (D.C.Cir.1950) is completely distinguishable because the Commission had before it in that case substantial evidence that the Missouri River in the relevant section was navigable. *Id.* at 494-97. That is not the case here.

related to, and were limited to, rights *validly* acquired in the past—"pursuant to law." § 23(a). This is an obvious reference to *law* existing at the time the permit or right of way was granted or acquired. Congress in its continuous supervision of navigable waterways *could* have legislated that all projects occupying nonnavigable waterways of the United States would require licenses if the rivers they occupied subsequently became navigable, even if they did not need licenses before and had prior existing rights of way. But Congress did not take this course. It did just the opposite: It preserved all *valid* rights of way acquired by grant pursuant to law prior to June 10, 1920 against being "affected" by being required to obtain a license to operate. 16 U.S.C. §§ 816, 817.

If the Spokane River *had* been a navigable river of the United States in

1910, as it was not, the necessity for complying with the requirements of the Rivers and Harbors Act would have been in a different posture. But since the stream was not navigable at that time, the Rivers and Harbors Act was not violated by the construction of the dam, and the right of way was *validly* acquired under then existing law. Such jurisdiction as the Commission may have subsequently gained over the lower part of the stream by the erection of the Grand Coulee Project was subject to and limited by section 23 of the Federal Power Act.[28] FERC's authority

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[28] It is recognized that the Commission contends that the river was *always* navigable because all it needed was the Grand Coulee Dam to make a small part of it navigable. But that argument refuses to take into account then existing Supreme Court decisions, the engineering limitations existing around 1905 and that even when Grand Coulee became possible and was erected it was a more enormous improvement than could *reasonably* have been expected would be undertaken to make the Spokane River navigable at any relevant time.

under the Federal Power Act, by virtue of section 23, specifically excludes the compulsory licensing of existing power dams constructed under a "valid right-of-way" granted prior to June 10, 1920—valid means valid when acquired.

The Commission nonetheless boldly embarked on a belated excursion into the legislative history of the Federal Power Act of 1935 and its predecessor, the Federal Water Power Act of 1920, in the same spirit in which it undertook its purported historical investigation of the 1905 Act. Its study of the 1905 Act, which explicitly provided for the hydroelectric development of the Spokane River along the southern boundary of the Spokane Indian Reservation, attempted to show that the Act in fact did *not* authorize the construction of power dams. Its research into the Federal Power Act of 1935 similarly purports to demonstrate that its

exceptions do not mean what they say. *See* 25 F.E.R.C. ¶ 61,002 at 61,011. The Commission's theory as to section 23(b) is difficult to summarize and its logic is somewhat opaque. From the House and Senate reports, H.Rep. No. 1318, 74th Cong., 1st Sess. (1935) and S.Rep. No. 621, 74th Cong., 1st Sess. 1, 47 (1935), and language in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 424, 61 S.Ct. 291, 307, 85 L.Ed. 243 (1940), the FERC apparently means to infer, though its language is unclear, that the Federal Power Act and the Rivers and Harbors Act acting together prohibit the *maintenance or operation* of any dam on a navigable waterway without a license from the Commission, *even those that have pre-FWPA authority*. 25 F.E.R.C. ¶ 61,002 at 61,013.

The FERC's astonishing interpretation of section 23(b) would eviscerate the prohibition Congress clearly placed on any

authority the Commission possessed to "affect" valid existing rights of way, including those at Little Falls in this case. Section 23(b) of the Federal Power Act unequivocally states that "[i]t shall be unlawful for any person ... to construct, *operate or maintain* any dam ... in any of the navigable waters of the United States ... *except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920.*" Thus this exception in section 23 runs specifically to the construction, operation and maintenance of power dams. Yet in the face of this clear mandate, and the similar import of section 23(a), the Commission attempts to rely on the legislative history, and completely unpersuasive and not particularly ingenious history at that, to conclude that "the 1899 statute, in common with the 1935 statute prohibits ongoing operation

activities as well as initial construction activities." *Id.* This perverted construction converts the prohibition the statute imposes on the Commission into a prohibition on those who "operate or maintain any dam ... [on an] existing right-of-way granted prior to June 10, 1920." If that construction can be deduced from the applicable statutes then anything is possible.

[17] This is an egregious example of an attempt to rely on legislative history in order to circumvent the clear intent of Congress. There may be cases where it is unclear whether a given power development was in fact constructed and continues to be operated and maintained under valid pre-FWPA authority, or whether the statute authorizing construction gave complete authority, and thus whether the pre-1920 exception to the Federal Power Act applies to it. But this is not such a case. Where

the record discloses that a power development clearly *was* constructed by 1910 and has been operated and maintained continuously under complete and valid authority granted prior to the creation of the Commission, as the Little Falls development was and is, the statute clearly prohibits the Commission from construing the obligation retroactively to require subsequent licensing by the Commission.

That the Commission's jurisdiction does not extend to developments with valid pre-FWPA authority is absolutely clear from the plain language of section 23 of the Federal Power Act. In accordance with the provisions of the 1905 Act the Secretary of the Interior gave his "consent" to Wilson and Washington Water Power Company (the appropriators) acquiring "the right to the use of the waters of the Spokane River ... *by*

appropriation under and pursuant to the laws of the State of Washington"; and, in keeping with the purposes declared in the title of the 1905 Act, he granted the "appropriators land on said reservation ... for the erection of dams [etc.] ... for the development of power [and] for the beneficial use of said water." 33 Stat. 1006. The language of the 1905 Act, in providing "[t]hat the right to the *use* of the waters of the Spokane River ... may ... be acquired ... by appropriation under ... Washington [law]," *id.*, implicitly includes the right to construct a dam in the Spokane River at Little Falls as only by the construction of a dam was it possible for the waters of the River to be appropriated and beneficially used "for power purposes." *Id.*

In sum, the development at Little Falls "for power purposes and the

beneficial use of said water"[29] was constructed and operated in full compliance with the 1905 Act. There is no reasonable contention to the contrary. At that time, given the nonnavigablity of the river, there was no applicable federal or state law that required any further authority. Existing federal laws only required approval of dams and obstructions in streams that were *navigable,* interstate or intrastate. Thus, it cannot be substantially questioned on this record that the Secretary's consent and grant, which included the "right-of-way" for the statutorily stated purposes, was "valid," and it is the "right-of-way" for the purposes granted that is protected and which the Commission illegally seeks to *"affect."* Given the title and provisions of the Act that refer to the "erection of

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[29] Title of 1905 Act.

... dams ... for the development of power"[30] it is clear that the Act did authorize the "erection" of dams, etc., for the appropriation of water for power purposes. The incorporation into the 1905 Federal Act of the water laws of the State of Washington, under which riparian owners on nonnavigable streams had the right to build dams to appropriate water rights, in effect empowered the Secretary of the Interior, by his "consent" to acquiring water rights by appropriation under Washington law, to authorize the erection of dams, etc., on reservation lands granted to an appropriator. It is also

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[30] *Id.*, Sec. 2. We have considered the Commission's argument that it may base jurisdiction on the coordination of the Little Falls development with other developments over which FERC has jurisdiction. Since we have found that Washington Power has a valid right of way that may not be "affected" under the FPA 23(a) and (b) exception, the coordination argument is without merit. We have considered the Commission's remaining arguments and find them without merit.

apparent that the Secretary correctly interpreted the 1905 Act as requiring his authorization to "erect the dam," which was given. There was no federal power act in effect prior to 1920. The Company therefore had both complete authority to build the dam at the time of construction and the valid right of way for that purpose granted before June 10, 1920, which is all that is required for the section 23 exception to apply.

The appropriation, construction and maintenance complied with the terms and conditions of the 1905 Act, and section 23 of the Federal Power Act prohibits the Commission from doing anything that would "affect" the rights so acquired. The Chairman of the Commission remarked on the "extraordinary lengths" to which the Commission reaches in its attempt to "extend its jurisdiction over Little Falls Dam." 25 F.E.R.C. ¶ 61,002 at 61,027

(Butler, Chrmn., dissenting). Indeed, one can hardly avoid the impression that the Commission, determined to seize jurisdiction over the property of the Washington Water Power Company, simply decided not to let the expressed intent of Congress stand in its way. We cannot countenance such a gross misconstruction of the statute.

VI. CONCLUSION

It is concluded that: (1) The Washington Water Power Company by appropriation acquired the water rights and the lawful right of way for the construction of a dam to divert, store and beneficially use the subject waters of the Spokane River and now owns the rights, title, interests, authority and right of way necessary for the construction, operation and maintenance of the Little Falls Power Development; (2) prior to June 10, 1920 such rights, etc., were acquired

and granted in accordance with the special Act of March 3, 1905 (33 Stat. 1006) and the laws of Washington made applicable by such Act; (3) the continuous operation and maintenance of the Little Falls Power Development by the Washington Water Power Company is exempted from the application of the Federal Power Act by sections 23(a) and (b), 16 U.S.C. §§ 816, 817, of said Act; (4) Commission Opinions Nos. 117 and 117-A and Orders pursuant thereto, are in violation of section 23 of the Federal Power Act, are invalid to the extent that they seek to require the Washington Water Power Company to apply for and obtain a license for the continuous operation and maintenance of the Little Falls Power Development, and therefore are reversed to such extent. The case is remanded to the Federal Energy Regulatory Commission for further action not inconsistent with this opinion.

Judgment accordingly.

MIKVA, Circuit Judge, dissenting:

Despite the majority's extensive and complex opinion, the questions in this case are quite straightforward. Section 23 of the Federal Power Act, 16 U.S.C. §§ 816-817 (1982) (FPA or Power Act), states that no person may operate a dam on navigable waters of the United States without being licensed under the FPA. There is an exception to this requirement: a person need not be licensed if he obtained a right-of-way to build the dam before the FPA became effective in 1920.

Petitioner Washington Water Power Company (Washington Power or the Company) operates a dam at the Little Falls section of the Spokane River in Washington state. The Company claims that it is not required to obtain a license under the FPA for two reasons. First, it contends that the

Spokane River was not navigable at the time the dam was built (1908-11), and so the FPA by its terms does not apply. Second, Washington Power argues that even if the FPA is applicable, the dam was built pursuant to a valid right-of-way given by a special statute in 1905 (the 1905 Act). (The Company bought the right-of-way from David Wilson, the original grantee under the 1905 Act). This, the Company claims, brings it within the exception outlined in § 23 of the FPA.

The Federal Energy Regulatory Commission (FERC or the Commission) rejected these arguments and ordered the Company to apply for a license. *Washington Water Power Co.*, 15 F.E.R.C. (CCH) ¶ 61,039 (1981). The Commission also rejected Washington Power's claim that FERC was barred from imposing the license requirement by collateral estoppel.

In deciding whether to uphold the Commission's decision that the Little Falls dam should be licensed, this court must answer three relatively simple questions. First, is Washington Power beyond the jurisdiction of the Commission and the Federal Power Act if the Spokane River was not navigable at the time the dam was built? Second, did the right-of-way given to the Company by the 1905 Act include the right to build a dam? Third, is FERC now barred by collateral estoppel from requiring Washington Power to apply for a license?

Because I believe that all these questions should be answered negatively, I would uphold the FERC decision.

A. *Scope of the Federal Power Act*

The first question is whether the FPA applies to the dam on the Spokane River at all. There is no question that the river is now a navigable waterway. The majority,

however, feels that because it was not navigable when the dam was built (I will assume, *arguendo,* that this is true), or in 1920 when the FPA was passed, that the Little Falls project is not covered by the terms of the Power Act. This approach has two flaws: it is an overly restrictive interpretation of the statute's scope, and it ignores the other sections of the FPA that give the Commission jurisdiction.

The majority undertakes an exhaustive examination of the evidence as to whether the river was navigable either when the dam was built or when the Power Act was passed. I think this discussion misses the point; the case law in this circuit makes it plain that FERC's jurisdiction is not as constrained as the majority assumes. In *Pennsylvania Water & Power Co. v. Federal Power Commission,* 123 F.2d 155, 162 (D.C.Cir.1941), *cert. denied,* 315 U.S. 806, 62 S.Ct. 640, 86 L.Ed. 1205 (1942), a

dam owner on the Susquehanna River refused to apply for a statutory permit to continue his operations. He argued, *inter alia*, that he had built the dam in reliance on the Secretary of War's determination that the river was not navigable. After finding that the river was currently navigable, the court said that the Commission's control over the nation's waterways was "continuing in nature," adding "[i]t cannot be considered, we think, that Congress [in § 23 of the FPA] meant to allow existing obstructions to continue unregulated in the navigable streams of the United States." *Id.* at 162, 163. Because it is conceded by all parties in this case that the Spokane River is navigable today, *see* maj. op. at 332, an earlier finding of non-navigability will not defeat the Commission's jurisdiction under the Power Act.

The majority's attempt to distinguish *Pennsylvania Water* by saying that FERC's jurisdiction will only reach *new* projects on the Spokane River is unpersuasive. It ignores the language of § 23 which says that a person may not build or *maintain* a dam on a navigable river without a license. Because the Spokane is now navigable, the dam at Little Falls must be maintained in compliance with the statute, despite any earlier findings of non-navigability. The majority's effort to restrict jurisdiction to a previous state of nature is as antediluvian as it sounds. Such a concept would make it impossible for Congress to protect and regulate our inland waterways, because many portions of such waterways at one time or another were non-navigable. This parsimonious measure, given the grand design of a national system of waterways, treats our rivers as if they were backyard wading pools.

Even if the river's current navigability did not give the Commission jurisdiction, there are independent grounds for finding that the Power Act applies. Section 23(b) of the FPA gives FERC jurisdiction over a dam or electric facility if it is on "any part of the ... reservations of the United States." 16 U.S.C. § 817 (1982). *See Federal Power Commission v. Oregon,* 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215 (1955) (acts relating to water appropriation do not limit Commission's right to license water power project on government reservation). A "reservation" is defined by § 3(2) of the FPA to mean any interest in land owned by the United States. 16 U.S.C. § 796(2) (1982).

In this case there is no dispute that the United States has a reversionary interest in the land along the north bank of the Spokane; Washington Power has title

to the land *for so long as* it is used for generating electricity. *See* 15 F.E.R.C. (CCH) ¶ 61,039 at 61,070-71. Should the Power Company stop using the land for this purpose, title would revert to the government. This is *not,* as the majority suggests, a determination that Washington Power no longer has good title to the land. It only means that the government has a reversionary interest in the event of non-use, and that this interest gives FERC jurisdiction.

A final reason that the FPA applies to petitioner's dam is that it operates along with other, licensed projects to form an "integrated unit of development." It is well settled that the Commission may license projects, even those on non-navigable rivers, if they affect interstate commerce. *Federal Power Commission v. Union Electric Co.,* 381 U.S. 90, 85 S.Ct. 1253, 14 L.Ed.2d 239 (1965).

There was testimony before the Administrative Law Judge below that strongly supports the notion that the Little Falls dam is part of a larger network of generating plants that sells power both intra- and interstate. One witness testified, for example, that the Company controlled water releases from the entire Spokane River development to enhance the generation at Little Falls. *See generally Washington Water Project*, 48 F.P.C. 339, 340 (1972). Congress's powers over interstate commerce are broad enough that FERC may license all projects that affect it, whether the river is navigable or not. *See Niagara Mohawk Power Corp.*, 4 F.E.R.C. (CCH) ¶ 61,009 (1978) (eight projects licensed as one unit).

The majority's response to these bases for jurisdiction is to dismiss them with the wave of its hand. In a footnote it says that because a finding that the

Power Act applied in this case would "affect" the Company's rights (which is prohibited by FPA § 23(a)), that the statute must not apply. Maj. op. at 63 n. 30. But this argument is logically flawed: it assumes that the Commission may not require the Company to obtain a license; since Washington Power does not have to obtain a license, any change requiring it to do so would "affect" its right-of-way; therefore (the reasoning goes) the Company must not be required to obtain a license, and so the FPA must not apply. But if, as I suggest below, the Company was *not* granted a right to build a dam by the 1905 Act, then FERC jurisdiction cannot be defeated on the ground that requiring a license would affect the Company's rights. In fact, *not* to require a license would *enlarge* the rights now enjoyed by Washington Power; this is also prohibited by § 23(a).

Whether the 1905 Act did or did not grant the right to build a dam is a separate question from whether the Federal Power Act applies in the first instance. Whether FERC has jurisdiction under the Power Act cannot be determined by begging the question of petitioner's rights, and then rejecting all claims that would somehow affect those rights.

Because FERC has continuing jurisdiction over the nation's rivers, because part of the Little Falls project is on a United States reservation, and because the dam is part of a network that affects interstate commerce, I believe that the Federal Power Act applies to this case. So the crucial question becomes whether the Little Falls project fits within the exception to the licensing requirement: specifically, did the 1905 Act include the right to build a dam?

B. *The 1905 Act*

If the 1905 Act gave the right to dam the river, then petitioner is not required to obtain a license under § 23(b) of the Power Act. This subsection provides that no license is required if a person operates a dam in accordance with a valid right-of-way granted before 1920, the year the FPA went into effect.

We begin with the language of the Act. The 1905 Act gave the grantee the right to "use" the waters of the Spokane. Depsite the majority's assurances, I am not convinced that the plain meaning of "use" includes the right to build a dam. "Use" could mean "consume *and* occupy" the river waters, in which case a dam would certainly be included; on the other hand it could just mean "consume." The majority repeatedly points out that the purpose of the statute was to encourage electric power production, but this does not mean

a fortiori that a dam was intended. As FERC noted in its opinion below, not all hydroelectric projects involve obstructing the river. 15 F.E.R.C. (CCH) ¶ 61,039 at 61,078 n. 18. Creation of obstructions was normally discouraged in river legislation, and it is not as clear to me as it is to my colleagues that the Act on its face gives a grantee the right to construct a dam.

Because the language of the statute is ambiguous, we turn to the legislative history. *Allen v. State Board of Elections,* 393 U.S. 544, 570, 89 S.Ct. 817, 834, 22 L.Ed.2d 1 (1969). Although determining congressional intent is always an imperfect science, the fruits of the search are very specific in this instance. The *precise* question we face was asked and *emphatically* answered during the debate in Congress. As the majority notes, the following exchange took place:

> Mr. Dalzell: How is the water power to be used, by dams in the river?
>
> Mr. Jones: They will *probably* dam the river. This is a matter they are willing to take care of *at some future time*....
>
> Mr. Dalzell: From what committee is this bill reported?
>
> Mr. Jones: From the Committee on Indian Affairs. It simply affects Indian lands and provides means by which persons can acquire the permanent rights.
>
> Mr. Lovering: *Does it carry the right to dam the river?*
>
> Mr. Jones: *Oh no, not at all*. That matter, if it came up, would have to go to the Committee on Interstate and Foreign Commerce. They have to take their chances on that.

39 Cong.Rec. 2413 (1905) (emphasis added).

I do not know how the legislative intent could be clearer. The drafter of the bill, Mr. Jones, gave an unqualified answer to a very specific question—the

1905 Act does not give the right to construct a dam.

The majority strives mightily and unsuccessfully to twist the above language into something else. It speculates that when Mr. Lovering asked "Does it [the Act] carry the right to dam the river?", he actually meant to say "Should this bill be considered by the Committee on Interstate and Foreign Commerce?" Maj. op. at 316-17. Its reasoning is that Mr. Lovering inquired about the proper committee because the Commerce Committee had jurisdiction over *navigable* waterways. Why this question should be asked (and why in this form) when only moments before Mr. Jones had said that the water was not navigable (and therefore did not have to be considered by the Commerce Committee), should cause the majority some problems.

The court also finds an irreconcilable conflict between the plain

meaning of the statement that the bill gives no right to construct a dam, and Mr. Jones' earlier statement that "[t]hey [the grantees] will probably dam the river ... at some future time." To my mind the two statements are perfectly consistent. All the parties involved expected that whoever received the right to use the water would probably dam the river eventually. But the right to do so was not included in the bill; therefore, it is a matter the grantee would have to take care of "at some future time." If the grantee or his assignee did wish to build a dam later, he would have to get specific permission from Congress; because the 1905 Act did not give this right, "[t]hey would have to take their chances on that."

This interpretation gives the simple, obvious meaning to everything the Congressmen said. It is also consistent with the general rule that grants should

be construed strictly in favor of the public and against the grantee. 3 C. Sands, *Statutes and Statutory Construction* § 60.02 at 81, § 64.05 at 120 (4th ed. 1974).

Once the proper meaning is given to the legislative history, the rest of the majority's rationale loses much of its force. The court makes much ado, for example, about the effect of state law on the 1905 Act. The majority takes pains to point out that water needed to be appropriated under Washington law, and that Wilson, the original grantee, carefully took all the necessary steps. These points are not in dispute. There is no question that Wilson validly obtained *all of the rights given* by the 1905 Act. The question remains, though, as to the extent of the rights granted. Because only Congress could give permission to dam the waters on a federal reservation, the

grantee's compliance with state law only means that he received everything that the state could give him.

The fact that the Interior Secretary interpreted the statute to include the right to build a dam does not change the analysis. When the intent of Congress is as clear and unqualified as it is here, the actions of an enforcement officer cannot be allowed to override it. *Morton v. Ruiz,* 415 U.S. 199, 237, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974) (courts should not defer to agency interpretations that are inconsistent with congressional purpose); *ITT World Communications, Inc. v. Federal Communications Commission,* 725 F.2d 732, 741 (D.C.Cir.1984) (agency construction of statute should be accepted unless inconsistent with obvious congressional intent). It is ultimately for this court to decide what statutes

mean, consistent with the legislative intent.

The common-sense interpretation of the 1905 Act does not, as the majority believes, make the statute void. Nothing in the Federal Power Act affects the right-of-way that *was* granted: the right to use the water and adjoining land. But because the legislative history makes it crystal clear that the Act did not give the right to construct a dam, FERC now has the authority to require that Washington Power obtain a license to operate the Little Falls project.

C. *Collateral Estoppel*

I also do not think that the Commission is collaterally estopped in this case. Petitioner relies on *United States v. Big Bend Transit Co.*, 42 F.Supp. 459 (E.D.Wash.1941), to support its claim that the government is precluded from asserting that the 1905 Act only gave the

right to use the water, not to dam it. In *Big Bend* the court assumed without actually deciding that the 1905 Act gave the respondent utility the right to build a dam. The Power Company argues that this case bars the government, through FERC, from relitigating the question.

The policy behind the doctrines of res judicata and collateral estoppel is to prevent relitigation of issues that were, or should have been, previously tried. *See* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4403 (1981). One reason for this preclusion is to keep a party from being forced to go through the trouble and expense of relitigating a point it has already won. *Id.*; *United States v. Mendoza,* 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984). Although there is no longer a firm requirement of mutuality of parties between the two suits, *Allen v. McCurry,*

449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), a litigant seeking to invoke collateral estoppel must still show that

(1) the issue must have been actually litigated;

(2) the issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial; and

(3) preclusion in the second trial must not work an unfairness.

Jack Faucett Associates, Inc. v. American Telephone and Telegraph, 744 F.2d 118, 125 (D.C.Cir.1984), *cert. denied,* — U.S. —, 105 S.Ct. 980, 83 L.Ed.2d 982 (1985), citing *Otherson v. Department of Justice, INS,* 711 F.2d 267, 273 (D.C.Cir.1983).

The points to be made in favor of collateral estoppel do not satisfy this three-part test. Although the *Big Bend* court obviously believed that permission to build a dam was included in the 1905 Act, 42 F.Supp. at 468, this determination

was not necessary to the holding of the case. The court simply decided that in a condemnation proceeding, the value of the land along the Spokane included the value of the rights granted by the 1905 Act. Whether the right to construct a dam was included in the compensation owed to the land owner does not affect the question of whether the land should be valued for its potential as a power site, or for its current agricultural use. Because the question before us was not necessarily decided by the *Big Bend* court, collateral estoppel does not apply.

It also would be unfair to preclude a discussion of the main issue in this case. Although the United States was a litigant in the previous suit, and is present here through FERC, in fact the real party in interest is the Spokane Indian Tribe. It was the Indian Tribe that originally raised the argument that the Little Falls

dam should be licensed in the proceedings below. Because the Indian Tribe did not have a chance to litigate the issue in *Big Bend*, it would be unfair now to bar the Tribe from fully pressing its claim.

CONCLUSION

I would affirm the Commission's decision to require the Power Company to apply for a license for the Little Falls project. The words of the statute—the right to "use" the river—are ambiguous enough to justify an examination of the legislative history. This history makes it so clear that the right to dam the river was *not* granted by the 1905 Act, that the majority's attempt to muddy the waters is a mystery. Our proper concern about excessive reliance on legislative history when the congressional intent is vague should not overwhelm us when the intent is clear. Because I think the majority has

changed the intended meaning of the 1905 Act, I dissent.

OCT 26 1992
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No. 92-546

In The

Supreme Court of the United States

October Term 1992

THE WASHINGTON WATER POWER COMPANY,

Petitioner,

v.

SPOKANE INDIAN TRIBE,

Respondent.

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Were the property rights of the Respondent in the case below *Spokane Indian Tribe v. State of Washington, Washington Water Power Company, and United States of America* (United States District Court, Eastern District of Washington No. C-82-7753-AAM; United States Court of Appeals, Ninth Circuit, Docket No. 91-35000) distinctly put in issue and directly determined by the Federal Energy Regulatory Commission or by the District of Columbia Circuit Court of Appeals in *Washington Water Power Company v. Federal Energy Regulatory Commission*, 775 F.2d 305, (D.C. Cir., 1985), which reviewed the Commission's decision?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. STATEMENT OF FACTS 2

II. STATEMENT OF PROCEEDINGS 4

REASONS WHY THE PETITION SHOULD BE DENIED 6

I. THE DECISION BELOW CONSISTENTLY APPLIED DECISIONS OF THIS AND OTHER COURTS ON THE ISSUE OF COLLATERAL ESTOPPEL 6

A. COLLATERAL ESTOPPEL APPLIES ONLY WHERE THERE IS AN IDENTITY OF ISSUES, THE ISSUE TO BE PRECLUDED ACTUALLY WAS LITIGATED AND DECIDED IN THE PRIOR ACTION AND DECIDING THE ISSUE WAS NECESSARY TO THE COURT'S JUDGMENT 6

B. PETITIONER INCORRECTLY CLAIMS DIVERGENCE OF CIRCUIT AUTHORITY WHERE COLLATERAL ESTOPPEL IS THE REAL ISSUE 12

II. THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT OF CERTIORARI 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Abraham v. Casey, 179 U.S. 210, 21 S.Ct. 88 10

Buffalo Forge Co. v. United Steel Workers of America, 428 U.S. 397, 96 S.Ct. 3141 13

County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 105 S.Ct. 1245 6

Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666 14

Little v. United States, 794 F.2d 484 (9th Cir., 1986) 7

Marks v. United States, 430 U.S. 188, 97 S.Ct. 990 13

Montana v. United States, 440 U.S. 147, 99 S.Ct. 970 7

Mother's Restaurant, Inc., v. Mama's Pizza, Inc., 723 F.2d 1566 (Fed. Cir., 1983) 11

Nevada v. United States, 463 U.S. 110, 103 S.Ct. 2906 ..7, 13

N.L.R.B. v. Master Slack and/or Master Trouser Corporation, 773 F.2d 77 (9th Cir. 1985) 11

N.L.R.B. v. Pittsburgh, 340 U.S. 489, 71 S.Ct. 453 14

Parklane Hosiery Corp. v. Shore, 439 U.S. 322, 99 S.Ct. 970 (1979) 11

Southern Pacific Railroad v. United States, 168 U.S. 1, 18 S.Ct. 18 .....7, 13

United States v. Big Bend Transit Company, 42 F.Supp. 459 (E.D. Wash. 1941) 10, 11, 12

United States v. IIT Continental Banking Company, 420 U.S. 223, 95 S.Ct. 926 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021 14

Washington Water Power Company v. Federal Energy Regulatory Commission, 775 F.2d 305 (D.C. Cir. 1985) ..... *passim*

STATUTES:

Federal Power Act. 16 U.S.C. § 791, et seq. 8

CONGRESSIONAL MATERIALS:

Act of February 15, 1901, 31 Stat. 7901 3

Act of March 3, 1905, 33 Stat. 1006 3

MISCELLANEOUS:

Kappler, *Indian Affairs, Laws and Treaties*, 925 2

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The Respondent, Spokane Indian Tribe, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the United States Court of Appeals for the Ninth Circuit in this case. That opinion is an unpublished Memorandum Opinion dated March 12, 1992, as set forth in the Petitioner's Appendix, page 4a.

STATEMENT OF CASE

I. STATEMENT OF FACTS[1]

In 1881 President Rutherford B. Hayes set aside the Spokane Indian Reservation by executive order:

> It is hereby ordered that the following tract of land, situated in Washington Territory be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely: . . . thence down the east bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River . . .

1 Kappler, *Indian Affairs, Laws and Treaties*, 925.

Around 1905, David Wilson, a private entrepreneur, owned certain lands on the south bank of the Spokane River near Little Falls, approximately 45 miles downstream from Spokane, Washington. In order to use the 83 foot drop in the river, to develop a hydroelectric power site, he needed to obtain an easement or interest in the north bank as well as the riverbed and appurtenant waters thereto.

The north bank of the Spokane River and all lands up to the high water mark on the south bank, including the riverbed itself, lay within the boundaries of the Spokane Indian Reservation. *Id.*

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[1] Respondents facts are set forth in affidavits submitted to the trial court for purposes of motions for summary judgment. The affidavits are part of the record submitted to the Circuit Court of Appeals.

Unwilling to make an investment under the strictures of obtaining a right-of-way pursuant to the Act of February 15, 1901, 31 Stat. 790 ("The 1901 Act"), Mr. Wilson enlisted Representative Wesley L. Jones of Washington, Congressman for that District, to sponsor a bill "[p]roviding for the acquirement of water rights . . . [and] land- . . . for sites for power purposes and the beneficial use of said water, and for other purposes. This bill, later enacted as the Act of March 3, 1905, 33 Stat. 1006, Pet. App. at iiia, ("the 1905 Act"), applied only to the Spokane River along the southern boundary of the Spokane Indian Reservation. It empowered the Secretary of Interior to consent to citizens, associations, and corporations of the United States to "use the waters" within the southern boundary of the Reservation pursuant to the laws of the State of Washington". *Id.*

The 1905 Act also empowered the Secretary of Interior to "grant" such appropriators the use of land, on the north bank, within the Reservation "for the erection of suitable water, electric, or power plants, dams . . . and other needful structures required for the development of power or for the beneficial use of said water." *Id.*

Immediately after Congress passed the 1905 Act Mr. Wilson took steps to secure interest in a tract of land on the north bank of the Spokane River and for the use of water rights pursuant to the provisions of the legislation. His application for a permit concerning the same was granted on November 3, 1906. Less than a year later he sold his interest to Washington Water Power.

In 1908 Washington Water Power began construction of the hydroelectric development on the Spokane Indian

Reservation. The plant facility was built on the north side of the Spokane River. As a result, Washington Water Power made use of about ten acres of additionally acquired Reservation lands not included in the purported acquisition assigned to it by its predecessor, David Wilson.

On May 18, 1908, Washington Water Power applied to the Secretary of the Interior for the right to use the waters of the Spokane River at the point of appropriation within the Reservation, as well as lands situated at the same location. The application was approved on May 6, 1910.

Little Falls hydroelectric development began producing electric energy that same year. This use of Reservation lands and waters, and the resulting interference with Tribal rights and interest in the property and its fisheries gave rise to the present controversy.

II. STATEMENT OF PROCEEDINGS

On October 13, 1982, the Spokane Tribe of Indians filed the present lawsuit in the United States District Court, Eastern District of Washington, against the defendants State of Washington and Washington Water Power Company for purposes of obtaining declaratory relief concerning ownership of the title to the bed and northern bank of the Spokane River, and water rights of that river, all of which lay within the southern boundary of the Spokane Indian Reservation. Complaint of Spokane Indian Tribe, No. C-82-753-AAM, E.D. Wash, filed October 13, 1982, Pet. App. at 68a. The Tribe's request for declaratory relief vis-a-vis Washington Water Power is principally an effort to obtain a final judgment declaring

the respective interests of the parties in and to the subject lands. *Id.*

In addition to seeking declaratory relief, the Spokane Tribe prayed for monetary damages against Washington Water Power for (1) that company's wrongful and lawful building, maintenance and operation of Little Falls Dam and reservoir on the Spokane Indian Reservation, and (2) for the loss of Tribal fisheries caused by the defendant's hydroelectric project. *Id.*

On December 21, 1984, during the pendency of its appeal of administrative decisions,[2] the first in a series of many summary judgment motions were filed by either party. Finally on November 9, 1989, all of the parties' motions for summary judgment were heard before the District Court. The District Court granted Washington Water Power's collateral estoppel motion. All of the Tribes' motions for summary judgment were denied. *See*, Order RE WWP and Litigation Schedule, Pet. App. at 16a. The Tribe moved for reconsideration but the District Court denied those motions. *See*, Order Denying Motion for Reconsideration, Pet. App. at 26a.

On September 14, 1990, the trial court entered an order certifying finality of its orders previously entered on summary judgment.[3] The appeal to the Ninth Circuit

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[2] Petitioner has set forth lengthy and argumentative discussion of the administrative proceedings which culminated in the decision of *Washington Water Power v. Federal Energy Regulatory Commission*. Respondent will properly address the issue of the *WWP v. FERC* proceedings below.

[3] Disclaimers of interest were subsequently filed on behalf of the United States and the State of Washington in the original

followed. The Ninth Circuit entered its Memorandum Decision on March 12, 1992 (Pet. App. at 4a), which is the subject of the Petition to this court.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW CONSISTENTLY APPLIED DECISIONS OF THIS AND OTHER COURTS ON THE ISSUE OF COLLATERAL ESTOPPEL[4]

A. COLLATERAL ESTOPPEL APPLIES ONLY WHERE THERE IS AN IDENTITY OF ISSUES, THE ISSUE TO BE PRECLUDED ACTUALLY WAS LITIGATED AND DECIDED IN THE PRIOR ACTION AND DECIDING THE ISSUE WAS NECESSARY TO THE COURT'S JUDGMENT.

Collateral estoppel precludes parties from relitigating issues already

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bed and banks of the Spokane River in the Spokane Indian Reservation. See Pet. at iii. Based on these disclaimers and the stipulation of the parties' judgment was entered quieting the Tribe's title in and to the river and riverbed as to the State of Washington and the United States. Therefore, all defendants were dismissed from the lawsuit pending appeal.

[4] The issues before the Ninth Circuit on appeal included collateral estoppel, and the separate issues of extinguishment and diminishment of the boundaries of an Indian Reservation. The Ninth Circuit chose to rule only on the collateral estoppel and remand to address the remaining issues. If WWP ultimately prevails on the issue of collateral estoppel the effect would be the extinguishment and diminishment of the boundaries of an Indian Reservation without the express consent of Congress contrary to the established law of this court. *See, e.g. County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245.

> *Distinctly* put in issue, and *directly* determined by a Court of competent jurisdiction.

Southern Pacific Railroad Co. v. United States, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27 (emphasis added), accord *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970. *See, Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906.

The Ninth Circuit correctly held in its March 12, 1992, Memorandum Opinion:

> Collateral estoppel applies when (1) there is an identity of issues, (2) the issue to be precluded actually was litigated and decided in the prior action, and (3) deciding the issue was necessary to the Court's judgment. *Little v. United States*, 794 F.2d 484, 487 (9th Cir., 1986).

Memorandum Order at 3, Pet. App. at 8a-9a. *Little* specifically sets forth the above collateral estoppel test in context of the *Montana* decision. 794 F.2d at 487.

In its Petition, Washington Water Power claims that all issues of title to Reservation lands and waters have been litigated and necessarily decided in *Washington Water Power Company v. Federal Energy Regulatory Commission*, 775 F.2d 305 (D.C. Cir. 1985) ("*WWP v. FERC*").

WWP v. FERC evolved out of administrative proceedings before the Federal Energy Regulatory Commission.[5]

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[5] The proceedings that the *WWP v. FERC* court reviewed are set forth at: *Washington Water Power Company, Project 2545*, 11 FERC ¶ 63,001, pp. 65,001 et seq. (1980) (Pet. App. at 345a); *The Washington Water Power Company, Project 2545-007*, FERC Opinion No. 117, 15 FERC ¶ 61,039, pp. 61,064 et seq. (1981) (Pet. App at 417a); *The Washington Water Power Company, Project*

In those proceedings the Commission claimed that Washington Water Power's Little Falls project was subject to licensing under the Federal Power Act. 16 U.S.C. § 791, et seq. The Tribe intervened in those proceedings. The Commission stated:

> Decision on the issue of Commission licensing jurisdiction will thus be focused on determination of the threshold issue of whether WWPC possessed a valid permit or right-of-way prior to June 10, 1920. The decision will not address questions of land titles, water rights, compensation, or Spokane Tribal rights, since these are clearly extraneous to the determination of the threshold jurisdictional issue.

11 FERC ¶ 63,001, Pet. App. at 351a-352a. The two subsequent administrative decisions rendered in this matter affirmed FERC's original determination and denied rehearing. See note 5, *supra*.

WWP then appealed these administrative decisions to the Circuit Court of Appeals for the District of Columbia. The D.C. Circuit in *Washington Water Power v. Federal Energy Regulatory Commission* framed the issues in that case as follows:

2545-007, FERC Opinion No, 117-A, 25 FERC ¶ 61,002, pp. 61,064 et seq. (1983) (Pet. App. at 480a).

Petitioner claims that the Spokane Indian Tribe "provoked" 21 years of vexatious litigation against WWP. It is quite evident in the above paragraph that the *FERC* proceedings were conducted by the Commission on their own accord regardless of the Spokane Tribes' intervenor status. To this day *no* tribunal has issued a decision on the claims of the Tribe as prayed for in their complaint in this case.

(1) "Whether Washington Water Power, prior to June 10, 1920, possessed a 'valid existing right-of-way to operate, or maintain (a) dam' at the Little Falls on the Spokane River." 775 F.2d at 311.

(2) "Whether these rights fall within the exception recognized and granted in §§ 23(A) and 23(B) of the Federal Power Act. 16 U.S.C. §§ 816 and 817." 775 F.2d at 323.

The *WWP v. FERC* Court had jurisdiction to hear appeals from decisions entered by the Federal Energy Regulatory Commission (See 16 U.S.C. § 825*l*) and made its ruling based on the record established in those administrative proceedings below. The issues focused upon WWP's claim that it was exempt from licensing. They clearly were not identical to issues raised by the Spokane Tribe in this case concerning its continuing proprietary interest in lands and waters acquisitioned for use by WWP, nor did they encompass issues of compensation for losses suffered by the Tribe as a result of the dam and reservoir.

In its Memorandum Decision below, the Ninth Circuit was correct when it stated:

> Neither issue implicates the Tribe's claimed ownership interest in land. Since the ownership issue could be resolved in the Tribe's favor without creating an inconsistency with Washington power [*WWP v. FERC*], the Tribe is not collaterally estopped from asserting its ownership claim. WWPC could have a valid right-of-way over land that is owned by the Tribe.

Memorandum Decision at 5, Pet. App. at 11a.

The Ninth Circuit below was also correct in stating that "the Tribe's ownership interest was never actually litigated during the Washington power proceedings." Memorandum Decision at 5, Pet. App. at 11a. The *WWP v. FERC* Court was evaluating the decision of the Federal Energy Regulatory Commission below it. The Commission decided that the Spokane Tribe's title, water rights and compensation therefor were "clearly extraneous" to the evaluation of WWP's licensing requirements. 11 FERC ¶ 63,001, Pet. App. at 352a. Having been foreclosed from litigating those specific issues in that forum, the Spokane Tribe was left with no alternative but to continue in United States District Court with the instant lawsuit.

The respective right, title and interests of the litigants in *WWP v. FERC* were no more a concern on judicial review than they had been during the underlying administrative process. The only significant question before the Court was whether the 1905 Act in and of itself authorized the building of the dam or reservoir, or whether some separate authority was required to accomplish this particular undertaking. 775 F.2d at 310-26; *see also* 775 F.2d at 338 (Mikva, J. dissenting).

Admittedly, the Appellate Court at one point referred to WWP's interest as being a "limited fee with implied reverter for non-use." 775 F.2d at 325 (citing, *United States v. Big Bend Transit Company*, 42 F.Supp. 459 (E.D. Wash. 1941)); however, on numerous other occasions this same interest was characterized as a "right-of-way" interest or easement, in contrast to the revocable permit which could be obtained under the 1901 Act. *See generally* 775 F.2d at 308-26. *Cf. Abraham v. Casey*, 179 U.S. 210, 220, 21 S.Ct. 88, 92. (References and opinions of courts will not be held res

judicata as to a question of title to property where that preclusive language of the opinion will not allow the issue to be adjudicated properly.)

The *WWP v. FERC* Court threshold determination focused on the issue of whether WWP had an existing right-of-way to operate or maintain a dam at the Little Falls site on the Spokane River. 775 F.2d at 311. The Court then had to determine whether that right fell within the exceptions to the Federal Power Act for licensing. 775 F.2d at 323. At no time was the Tribe's interest in the disputed property at issue before the *WWP v. FERC* Court.

Once the threshold question was answered, all other pronouncements incidental or collateral to determination of the case at hand would constitute dicta and, therefore, not preclude litigation of issues now raised in this lawsuit. *N.L.R.B. v. Master Slack and/or Master Trouser Corporation*, 773 F.2d 77, 81 (9th Cir. 1985). *See, Parklane Hosiery Corp v. Shore*, 439 U.S. 322, 99 S.Ct. 970 (1979). *See also, Mother's Restaurant, Inc., v. Mama's Pizza, Inc.*, 723 F.2d 1566 (Fed. Cir., 1983) (Incidental or collateral determination of a non-essential issue will not preclude future litigation of the same); Restatement 2d of Judgments, § 27, comment h, 1982.

Likewise, the decision in *United States v. Big Bend Transit Company, supra*, cited by the *WWP v. FERC* Court, 775 F.2d at 325, for the proposition the 1905 Act confirms a limited fee interest with implied right of reverter, is not controlling. That case was decided in the context of a condemnation proceeding. The sole, dispositive issue was whether the condemnee, through its efforts towards

acquisition under the 1905 Act, was entitled to seek compensation for the government's condemnation of lands along the Spokane River associated with the Grand Coulee Dam Reservoir. The *Big Bend Transit* Court answered in the affirmative and held the condemnee was entitled, based on estoppel theories, to have the issue of compensation submitted to a jury. 42 F.Supp. at 473-75. The type of interest acquired by the condemnee was not an issue before the Court.

B. PETITIONER INCORRECTLY IMPLIES A DIVERGENCE OF CIRCUIT AUTHORITY WHERE COLLATERAL ESTOPPEL IS THE REAL ISSUE.

Petitioner improperly invokes the language of this Court rules[6] to attempt to argue that the decision of the Ninth Circuit is or will lead to a conflict of decisions between circuits.[7] This is simply not the case. Petitioner's attempt to fit the square peg of collateral estoppel into the round hole of this Court's jurisdictional requirements is unfounded as a last effort to reverse the Ninth Circuit's sound decision.

On numerous occasions this Court has granted certiorari due to a divergence in circuit opinion, where a

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[6] Rules of the Supreme Court of the United States, Rule 10.1 (a). Pet. at 43.

[7] Petitioner even goes on to make the ludicrous statement that in the event that this Court does not grant certiorari the United States District Court for the Eastern District of Washington would be put in the position of questioning the authority of the D.C. Circuit Court of Appeals. Pet. at 48.

difference in circuit opinion on the interpretation of a statute, or other rule of law has been apparent. *See Buffalo Forge Co. v. United Steel Workers of America*, 428 U.S. 397, 96 S.Ct. 3141, *United States v. ITT Continental Banking Company*, 420 U.S. 223, 95 S.Ct. 926, and *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990. Collateral estoppel cannot be a substitute. The rule naturally invokes judgment of separate tribunals and should not be interpreted as divergence.

The policies announced by this Court on the rules of res judicata and collateral estoppel are strong and in no way threatened in this case. They establish that issues distinctly and directly determined by a court should not be disputed in a later action. The doctrines will "secure the peace and repose of society by settlement of matters capable of judicial determination" . . . to aid judicial tribunals towards conclusiveness of decisions. *Southern Pacific Railroad*, 168 U.S. 1, 48, 18 S.Ct. 18, 27. In addition, this Court has underlined the importance in the finality of a decision in a real property dispute so future title is ensured. *Nevada v. United States*, 463 U.S. 110, 130 n. 10, 110 S.Ct. 2906, 2918. The Spokane Indian Tribe asks for a court to lend such finality. Complaint of Spokane Indian Tribe, No. C-82-753-AAM, E.D. Wash, filed October 13, 1982, Pet. App. at 68a. At no time has any tribunal ruled on the merits of the respondent Tribe's Complaint in this case. The *WWP v. FERC* Court only reviewed the Federal Energy Regulatory Commission decision which held that the issue of the Tribe's rights were "clearly extraneous" to the determination of licensing jurisdiction. 11 FERC ¶ 63,001, Pet. App. at 351a-352a.

II. THERE ARE NO SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT OF CERTIORARI

Certiorari will be granted by this Court where important questions and issues are raised. *See, e.g. United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021 (certiorari granted because of the obvious importance of the question), *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666 (certiorari granted on an important Constitutional question).

As petitioner has stated the record in this case is long and involved.[8] Under most circumstances this Court will not interfere with a circuit court of appeals decision where a "conscientious consideration" of the record and an appreciation of circumstances of the record has yielded the result below. *N.L.R.B. v. Pittsburgh*, 340 U.S. 489, 503, 71 S.Ct. 453, 456. The Ninth Circuit has sifted through the surplusage in the record below and made its decision based on the fact that the Spokane Indian Tribe has not had its property rights properly addressed or vindicated. This is quite clear in the interpretation of the language of the Federal Energy Regulatory Commission proceedings and the *WWP v. FERC* case decision on the narrow issues before it.

WWP is misleading this Court by suggesting that the *WWP v. FERC* decision gave them a fee simple absolute in the Little Falls property. On the contrary, that decision only recognized that WWP had acquired sufficient rights

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[8] See e.g. petitioner's Appendix pages 1a-754a. The parties have submitted that they have not included the entire record due to its bulk. *Supra* and Pet. at 21.

under the 1905 Act to trigger the exceptions in the licensing provisions of the Federal Power Act. 775 F.2d 305.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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